Boston College Law Review

Volume 15
Issue 6 *Number 6*

Article 3

7-1-1974

1973-1974 Annual Survey of Labor Relations Law

Thomas J. Flaherty

Michael J. Vartain

1973—1974 ANNUAL SURVEY OF LABOR RELATIONS LAW*

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* The authors wish to express their appreciation to Professor Richard S. Sullivan of the Boston College Law School for his encouragement, time, and helpful comments. The opinions expressed in this comment, however, are those of the authors.

INTRODUCTION

This is the thirteenth in a series of annual comments designed to summarize and analyze significant developments in labor law. Cases decided during the Survey year—April 1, 1973 to March 31, 1974—are reviewed in a format intended to be helpful to labor law practitioners as well as to the general readership of this review.

Significant National Labor Relations Act decisions were rendered by the Supreme Court in the areas of solicitation/distribution activity,[1] election interference,[2] arbitration of plant safety disputes,[3] and union discipline of rank-and-file strikebreakers.[4]

Furthermore, during the Survey year, the Supreme Court has been unusually active in resolving issues which have arisen in employment discrimination cases under Title VII, as well as under the Civil Rights Act of 1866 and the Fourteenth Amendment. While these decisions have settled several controversial issues regarding employment practices, additional questions, raising issues appropriate for Supreme Court review in the future, have contemporaneously divided the lower federal courts. The issues resolved by the Supreme Court during the Survey year include: the effect of a prior adverse arbitration award in a Title VII case;[5] the burden of proof requirements under Title VII;[6] the permissibility of mandatory maternity leave regulations in public school systems;[7] and the scope of the prohibition against discrimination on the basis of alienage by private[8] and state government[9] employers.

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[1] See pp. 1138-43 infra.
[2] See pp. 1114-17 infra.
[3] See pp. 1182-87 infra.
[4] See pp. 1122-30 infra.
[5] See pp. 1187-98 infra.
[6] See pp. 1211-18 infra.
[7] See pp. 1222-27 infra.
[8] See pp. 1234-42 infra.
[9] See pp. 1234-42 infra.

I. REPRESENTATIONAL AND ORGANIZATIONAL ACTIVITY

A. *Employer's Role in Representation Affairs*

1. *"Midwest Piping" Doctrine—Duty of Neutrality:* Playskool; Western Commercial

The Survey year saw significant judicial review of the policy of the Board in regard to the duty of an employer confronted with recognitional demands by two or more unions. Section 8(a)(2) of the National Labor Relations Act (NLRA or Act) forbids an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ."[1] When an employer recognizes as his employees' bargaining representative a union which is not supported by a majority of the employees, he violates section 8(a)(2) by bestowing "support" upon the minority union.[2] Thus, until the majority of employees have evidenced their choice of a bargaining representative, the employer is held to a duty of neutrality among the unions rivaling for the choice of the majority. In *Playskool, Inc. v. NLRB*,[3] a Survey year decision by the Seventh Circuit, the Board's view of the scope of this duty of neutrality, popularly termed the *Midwest Piping* doctrine, was decisively rejected. However, the Fifth Circuit, speaking during the Survey year in *NLRB v. Western Commercial Transport, Inc.*,[4] accepted the Board's *Midwest Piping* doctrine, and thus adopted a position contrary to that taken by the Seventh Circuit and the other circuit courts.[5]

First announced by the Board in *Midwest Piping & Supply Co.*[6] in 1945, the *Midwest Piping* doctrine defined the employer's duty of neutrality under section 8(a)(2) as an obligation to refrain from recognition of one of two or more rival unions at a time when "there existed a real question concerning the representation of the employees."[7] The Board, since *Midwest Piping,* has not formulated

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[1] 29 U.S.C. § 158(a)(2) (1970).

[2] ILGWU v. NLRB (Bernard-Altmann), 366 U.S. 731, 738 (1961).

[3] 477 F.2d 66, 73, 82 L.R.R.M. 2916, 2921 (7th Cir. 1973).

[4] 487 F.2d 332, 334, 84 L.R.R.M. 2814, 2815 (5th Cir. 1973).

[5] The Seventh Circuit, in *Playskool,* noted that the courts of appeals have generally refused to adhere to the Board's *Midwest Piping* doctrine. 477 F.2d at 69-70, 82 L.R.R.M. at 218. Among these courts are the Ninth Circuit, NLRB v. Peter Paul, Inc., 467 F.2d 700, 80 L.R.R.M. 3431 (9th Cir. 1972); the Eighth Circuit, Modine Mfg. Co. v. NLRB, 453 F.2d 292, 79 L.R.R.M. 2109 (8th Cir. 1971); and the Sixth Circuit, American Bread Co. v. NLRB, 411 F.2d 147, 71 L.R.R.M. 2243 (6th Cir. 1969). The *Playskool* decision includes the Seventh Circuit among these courts, but the *Western Commercial* decision, adopting the *Midwest Piping* doctrine, aligns the Fifth Circuit with the Board.

[6] 63 N.L.R.B. 1060, 17 L.R.R.M. 40 (1945).

[7] 63 N.L.R.B. at 1070, 17 L.R.R.M. at 55.

any specific rules governing the required amount of support and the proper means of proof of the support that would be sufficient to create a real question concerning representation.[8] Instead, it has traditionally required a union to show that its claim to majority status is "not clearly unsupportable and lacking in substance"[9] if it seeks to prevent the employer from recognizing its rival. As applied by the Board, this test meant that although a union had provided clear evidence of majority status, it was not entitled to recognition by the employer if the union's rival had provided the employer with evidence of majority support so that its claim to majority status is "not clearly unsupportable and lacking in substance." In the Board's *Playskool* decision,[10] the evidence indicated that the employer recognized the union as the representative of his employees, although he knew that the union's rival had demonstrated almost thirty percent support in a prior election and had since continued organizational and solicitational campaigning. The rival had not petitioned for an election; nevertheless the employer was aware that it was seeking recognition. The Board conceded that the union which was recognized by the employer held a majority of valid authorization cards at the time of recognition, a fact verified by the state labor conciliation service.[11] Nevertheless, the Board held the employer violated section 8(a)(2) by granting the union recognition on the basis of the card majority, since the rival had demonstrated substantial support sufficient to create what it termed a real issue concerning representation.[12]

The Seventh Circuit *Playskool* decision, reversing the Board, held that the employer was permitted to recognize the union despite the lack of an election, since the union had demonstrated majority support.[13] The court reasoned that there is no issue concerning representation where the union had demonstrated majority support, but its rival had not. Recognizing[14] that giving its imprimatur to such employer conduct foreclosed the use of the Board's election machinery[15] as a means of settling conflicting claims to majority status, the court nevertheless concluded that its decision promoted proper labor policies by enabling the employer to give more im-

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[8] 477 F.2d at 69, 82 L.R.R.M. at 2918.

[9] Playskool, Inc., 195 N.L.R.B. 560, 79 L.R.R.M. 1507 (1972).

[10] Id.

[11] Id. at 560, 79 L.R.R.M. at 1510.

[12] Id.

[13] 477 F.2d at 70, 82 L.R.R.M. at 2919.

[14] Id.

[15] 29 U.S.C. § 159(c)(1)(B) (1970) authorizes the Board to conduct elections to determine the bargaining representative of the employees if there is a question of representation of the employees.

mediate effect to the employees' majority will and thereby to promote industrial peace.[16] By sanctioning the employer's recognition, the *Playskool* court implies that the employer's statutory right to petition for an election[17] was not an equally adequate method of achieving these labor policies. Where there is sufficient evidence of its majority status despite the evidence of substantial support of the rival, the Seventh Circuit felt the employer bestows no unlawful support by recognizing the union.

However, the Fifth Circuit in *NLRB v. Western Commercial Transport, Inc.*,[18] upon a fact situation substantially similar to that in *Playskool,* agreed with the Board that a real question concerning representation encompasses the situation where there are two rival unions, one of which presents evidence of a card majority and one which presents evidence of substantial employee support falling somewhat short of a majority. The court there indicated that it is not improper for the Board, in this situation, to require the employer to postpone recognition until valid election results are available.[19] In the light of the broad discretion usually afforded the Board in matters concerning methods of demonstrating majority support,[20] and since neither the statute itself nor any strong statutory policy dictates otherwise, the courts of appeals might better defer to Board judgment and thus promote a uniform national policy.

The rival union situation presents special problems which justify the Board's judgment. First, unlike the case where only one union is soliciting employee support, the situation involving competition among rival unions, each of which exhibits substantial employee support, presents greater possibilities of unlawful employer support of either union. The employer, faced with the certainty that one of the two unions will "get in," has an inducement to interfere with the employees' free choice by favoring that union considered by him to be less aggressive. The inclination to favor a union is not as great where only one union seeks to represent the employees. Secondly, in the situation where two unions are competing, there exists the possibility that employees have signed authorization cards of both unions, thus placing in doubt the validity of an apparent card majority on the part of either union.[21]

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[16] See 477 F.2d at 73, 82 L.R.R.M. at 2920.

[17] 29 U.S.C. § 159(c)(1)(B) (1970) gives an employer the right to petition the Board for an election to determine the collective bargaining representative of his employees where there exists a question of representation.

[18] 487 F.2d 332, 84 L.R.R.M. 2814 (5th Cir. 1973).

[19] Id. at 334, 84 L.R.R.M. at 2815.

[20] See NLRB v. Gissel Packing Co., 395 U.S. 575, 610-16 (1969).

[21] See 477 F.2d at 72, 82 L.R.R.M. at 2920.

It is reasonable that the Board curtail the discretion of an employer confronted with the substantial claims of rival unions, since the employer's perception that one has majority support may often be in error. Proscribing such recognition as unlawful employer support violative of section 8(a)(2) is a reasonable means of preventing the danger that an employer will recognize a minority union. The Board's *Midwest Piping* doctrine, which concededly favors the election machinery over employer judgment[22] as a means of ascertaining the employees' will, continues to be applied by the Board in its Survey year decisions.[23] Thus, a continued conflict between the Board and the courts of appeals is likely, and a resolution of the dispute by the Supreme Court would be welcome.

2. *Pre-Hire Contracts and Representation in the Construction Industry:* R. J. Smith

Both an employer[24] and a union[25] are ordinarily prohibited from executing a collective bargaining agreement at a time when the union does not represent a majority of employees.[26] Nevertheless, section 8(f)[27] of the Act permits a collective bargaining agreement,

[22] Employer judgment of the merits of the conflicting claims of majority support made by each of two rivals exists even where, as in *Playskool,* the employer submitted the issue to an impartial third party. In *Playskool,* the employer failed to notify the third party of the organizational and recognitional effort of a union, other than the one whose cards were to be checked. Thus, the third party judge was not appraised of circumstances that would necessitate an investigation into the possibility that authorization cards of both unions were signed by the same employees, in which case an apparent union card majority could become an invalid index of employee sentiment. 477 F.2d at 742, 82 L.R.R.M. at 2920. The court of appeals justified the failure by the employer to notify the impartial third party. It reasoned that the rival had not recently claimed to have increased the 29.9 percent support it garnered in the prior election, and thus the employer was not aware that its claim to recognition was substantial. 477 F.2d at 742, 82 L.R.R.M. at 2920-21. However, it was the employer's judgment, in determining that the rival had not increased support since the last election, which tainted the validity of the card check performed by the independent third party.

[23] E.g., Robert Hall Gentilly Rd. Corp., 207 N.L.R.B. No. 113, 84 L.R.R.M. 1538 (1973); Traub's Market, 205 N.L.R.B. No. 124, 84 L.R.R.M. 1078 (1973). See California Gen'l Linen Supply Co., 206 N.L.R.B. No. 37, 84 L.R.R.M. 1613 (1973); Playskool, Inc., 205 N.L.R.B. No. 165, 84 L.R.R.M. 1129 (1973).

[24] 29 U.S.C. § 158(a)(1) (1970) proscribes employer interference with the statutory rights of employees, among which is the right to bargain collectively through representatives of their own choosing. 29 U.S.C. § 157 (1970). 29 U.S.C. § 159(a) (1970) defines "representatives" as those "designated or selected for the purposes of collective bargaining by the majority of employees . . . ." See also ILGWU v. NLRB (Bernhard-Altmann), 366 U.S. 731, 738 (1961).

[25] 29 U.S.C. § 158(b)(1)(A) forbids a union to "restrain or coerce employees in the exercise of their rights." This section is interpreted as prohibiting a union to accept the employer's recognition while it is a minority union. 366 U.S. at 738.

[26] See *Bernhard-Altmann,* 366 U.S. 731 (1961).

[27] 29 U.S.C. § 158(f) provides in pertinent part:

> It shall not be an unfair labor practice . . . for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction

which necessarily contains a recognition of the union as the employees' bargaining representative, to be executed by an employer in the construction industry and a union not representing a majority of his employees. In a significant Survey year decision by the District of Columbia Circuit, *Operating Engineers, Local 150 v. NLRB (R.J. Smith),*[28] it was held that an employer is not entitled to breach the section 8(f)-validated contract with the minority union simply because the contracting union had not yet achieved majority status among the employees of the construction industry employer. Confronted with a section 8(f) issue of first impression, the court in *R.J. Smith* rendered a decision which, if followed by the Board and other courts, would be likely to lend stability to labor relations in the construction industry.

In this case, the employer and the union executed a contract regulating the terms and conditions of employment of employees yet to be hired by the employer. The collective bargaining agreement included a union security provision which was never enforced during the term of the contract. At the time of the making of the contract, the union was necessarily not a majority union since, as contemplated by the draftsmen of section 8(f),[29] the employer had not yet hired the employees to be employed on upcoming construction projects. Thus, the employer had no employees by whom a bargaining representative could have been selected. Nevertheless, in order to allow the employer to ascertain his costs of labor before bidding on construction contracts, this collective bargaining agreement, popularly termed a "pre-hire contract," was lawfully executed under section 8(f) protection. During the term of this pre-hire contract, the employer unilaterally altered wages and other employment conditions specified by the contract.[30] The employer refused to bargain over the alterations on the ground that the union was still a minority union, and thus had no right to represent the employees for bargaining purposes.[31] The union filed a refusal to bargain charge against the employer, which alleged a violation of section 8(a)(5).[32]

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employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement . . . *Provided further,* That any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 159(c) or 159(e) of this title.

[28] 480 F.2d 1186, 83 L.R.R.M. 2706 (D.C. Cir. 1973). For a comprehensive analysis of this case, see Note, 15 B.C. Ind. & Com. L. Rev. 862 (1974)

[29] See H.R. Rep. No. 741, 80th Cong., 1st Sess. 5 (1959), reprinted in 1 Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 759, 777 (1959).

[30] 480 F.2d at 1187-88, 83 L.R.R.M. at 2707.

[31] R.J. Smith Constr. Co., 191 N.L.R.B. 693, 695, 77 L.R.R.M. 1493, 1496 (1972).

[32] 29 U.S.C. § 158(a)(5) makes it an unfair labor practice for an employer to refuse to bargain with the bargaining representative of his employees.

The union conceded that the union security provision of the contract had gone unenforced and that it did not yet qualify as the statutory, majority-supported bargaining representative of the employees currently working for the employer.[33]

The Board, reasoning that the union was not the employees' bargaining representative, refused to hold that the employer violated his duty to bargain. Noting that under a section 8(f) pre-hire contract the union was not entitled to the presumption of majority status otherwise given to a union during the term of the collective bargaining agreement, the Board stated that the union had no right to assert a right to bargain with the employer since it was not the employees' majority representative.[34] Allowing the proof of the union's minority status as an affirmative defense to the section 8(a)(5) complaint, the Board held that section 8(f) validated only the *execution* of the pre-hire contract, and did not obligate the employer to adhere to it unless the union achieved majority status, either through enforcement of a union security provision or otherwise. According to the Board, the exception to the requirement of majority union bargaining created by section 8(f) did not continue after the execution of the pre-hire contract. This discontinuation of employer bargaining obligations to the minority union after the date of execution of the pre-hire contract was supported, according to the Board's opinion,[35] by section 8(f) itself. The Board reasoned that since section 8(f) gave the employer the right to petition for an election among his employees in order to challenge the majority status of the union at any time,[36] the employer was not required to presume the union was currently the majority representative and thus deserving of bargaining recognition. Members Fanning and Brown argued in dissent that since Congress validated the pre-hire contract, it would be unreasonable to hold that it nevertheless permitted the employer to alter or repudiate the contract upon his own judgment as to the union's current status, since such a result would interfere with the aim of validating the execution of the contract.[37]

Though the District of Columbia Court of Appeals conceded that the Board's concern for the union's need to acquire majority

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[33] 480 F.2d at 1188, 83 L.R.R.M. at 2707.

[34] 191 N.L.R.B. 693, 695, 77 L.R.R.M. 1493, 1496 (1972).

[35] 191 N.L.R.B. at 694-95, 77 L.R.R.M. at 1495-96.

[36] Under § 9(c)(3) of the Act, 29 U.S.C. § 159(c)(3) (1970), the Board may not direct an election in a bargaining unit in which a valid election had been conducted within the preceding twelve months. The § 8(b) proviso exempts construction industry employers and unions working under a pre-hire contract from this bar.

[37] 191 N.L.R.B. at 695-96, 77 L.R.R.M. at 1496.

status was warranted,[38] it nevertheless agreed with the Board dissenters that the election machinery made available to the employer by the section 8(f) proviso, rather than the employer's own judgment, was the exclusive method for the employer to prove the union's minority status and to lawfully repudiate the contract or avoid bargaining duties.[39] The court interpreted section 8(f) as establishing the election machinery as the sole means of testing the union's status, especially since leaving the employer's discretion as an alternative method would render contracts voidable at will.[40]

The decision—that the employer must fulfill bargaining and other statutory obligations until an election proves the union to be supported by less than a majority—appears correct in light of the purpose of section 8(f) and practical circumstances. If the employer is permitted to repudiate the pre-hire contract at will, he may then refuse to enforce a union security contractual provision, and in that way prevent the union's attainment of majority status. Furthermore, if the employer can repudiate the contract and unilaterally alter conditions of employment, the employer will be able to lower the prestige of the union and consequently discourage employee membership and prevent the union from achieving majority status. Thus, unless the union can resort to the Board to remedy employer unfair labor practices, such as refusals to bargain over contract alterations, the employer will be permitted to prevent the union's attainment of majority status, and then to rely on that as justifying its repudiation of the pre-hire contract. It would be inequitable to allow the construction industry employer to breach the pre-hire contract, since such conduct would unfairly reduce the union's chances of attaining majority status.

Permitting unilateral contract repudiation without the statutory prerequisite of an election will compromise the integrity of pre-hire construction contracts, and thus weaken the congressionally-approved structure of collective bargaining in the industry. Although the *R.J. Smith* decision was accepted by the Board on remand as the law of the case,[41] the Board did not express agreement with the decision. In order to promote stability in construction industry bargaining and give effect to the representation scheme contemplated by section 8(f), the Board would do well to reverse itself and follow the lead of the District of Columbia Circuit.[42]

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[38] 480 F.2d at 1190, 83 L.R.R.M. at 2709.

[39] Id. at 1189-90, 83 L.R.R.M. at 2709.

[40] See id. at 1190, 83 L.R.R.M. at 2709.

[41] R.J. Smith Constr. Co., 208 N.L.R.B. No. 90, 85 L.R.R.M. 1187 (1974).

[42] In NLRB v. Irvin, 475 F.2d 1265, 82 L.R.R.M. 3015 (3d Cir. 1973), another § 8(f) Survey year decision, the Third Circuit also held that the employer's unilateral repudiation of

B. *Election Interference*

1. *Waiver of Union Dues:* Savair Manufacturing

The 1973-1974 Survey year evidenced a significant Supreme Court willingness to overrule Board-promulgated policies in the area of regulation of elections,[43] and to substitute for the Board policy those policies thought more desirable by the judiciary. In *NLRB v. Savair Manufacturing Co.*,[44] the Supreme Court rejected the Board request for deference to its administrative expertise and discretion in the regulation of elections.[45] Instead, it held that a campaigning union's waiver of initiation dues for employees, who sign union authorization cards before the election, violates the principle of free and fair elections, and thus is an impermissible campaign tool.[46]

The facts in *Savair Manufacturing* are as follows: Prior to the election, union agents solicited signatures of authorization cards from the employees, who were currently unrepresented. The agents promised that the union would exempt the employees who signed the cards before the election from the otherwise usual obligation to pay initiation dues.[47] The obligation to pay initiation dues, as the signing employees were contemporaneously informed,[48] would not attach unless the union won the election and then executed a collective bargaining agreement containing a union security provision specifying payment of such dues by employees.[49] Although the initiation dues were only ten dollars, the employer nevertheless contended that the conditional waiver of that obligation in soliciting card support unlawfully interfered with the later election, won by the union in a 22-20 vote.[50] Relying on its prior decision in *DIT-MCO, Inc.*,[51] the Board had rejected the employer's contention that the waiver of dues made the subsequent election invalid.[52] Instead, it held that the union's inducement to sign the cards in no way

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the pre-hire contract violated his duty to bargain. However, there the union was entitled to presumption of majority status because the union security provision had been enforced, and thus the factual situation clearly foreclosed an employer challenge to the union's majority outside the election machinery.

[43] 29 U.S.C. § 159(c) (1970) authorizes the Board to conduct secret ballot elections among employees in order for them to select by majority will their collective bargaining representative.

[44] 414 U.S. 270 (1973).

[45] Id. at 276.

[46] Id. at 276-81.

[47] Id. at 273.

[48] Id. at 282.

[49] Id.

[50] Id. at 278.

[51] 163 N.L.R.B. 1019, 64 L.R.R.M. 1476 (1967), enforced, 428 F.2d 775, 74 L.R.R.M. 2664 (8th Cir. 1970).

[52] See Savair Mfg. Co., 194 N.L.R.B. 298, 78 L.R.R.M. 1605 (1971), enforcement denied, 470 F.2d 305, 82 L.R.R.M. 2085 (6th Cir. 1972).

influenced the employees' freedom of choice exercised in the secret ballot elections.[53]

In its *DIT-MCO* decision, the Board had reasoned that the union waiver of initiation fees, although inducing signature of the cards, results in no restriction upon the employees' independence at the polls.[54] Hypothesizing that an employee could sign the card merely to qualify for the waiver of the initiation dues but actually oppose the union's selection as the bargaining representative, the Board in *DIT-MCO* pointed out that he is not induced to subliminate his actual desires and vote for the union.[55] If avoiding initiation dues is his objective, he can best promote that end and still fulfill his actual choice by voting against the union. Voting against the union would promote a union election loss, which in turn would automatically prevent any liability, not only for union membership initiation fees, but also for any other dues. Furthermore, even though he voted anti-union at the polls, the employee who had signed the card would not forfeit his qualification for the waiver of initiation dues that would accrue if the union won the election and negotiated a contract containing union security provisions.[56] With these considerations in mind, the employee, antagonistic to the union, would have nothing to gain by casting a vote favorable to the union,[57] whether or not he was induced to sign an authorization card by the union's promise to waive initiation dues. With respect to pro-union employees who have qualified for the dues waiver by a pre-election signature of an authorization card, the economic benefit to be received would not have any coercive impact upon his vote, which would, in any case, be cast for the union.[58]

Despite this compelling Board argument, the majority of the Court in *Savair Manufacturing* strained to find some circumstances in which the union's economic inducement to sign the cards could result in an inducement to vote for the union, and thus taint the election with unfairness. It stated that by sanctioning this means of card solicitation, the union is permitted to "buy endorsements and paint a false portrait of employee support during its election campaign,"[59] which in turn may be used to convince co-workers to express their support of the union at the polls. Secondly, the Court stated that although the employee may be aware that the waiver-induced signature of the card imposes no legal obligation to vote for

[53] 414 U.S. at 275-77.
[54] 163 N.L.R.B. at 1021-22, 64 L.R.R.M. at 1477-78.
[55] Id.
[56] Id.
[57] Id.
[58] Id.
[59] 414 U.S. at 277.

the union, he may nevertheless feel a duty to continue, at the polls, the support of the union initially indicated by his card signature.[60] These possibilities, though unsupported by evidence in the record, were relied upon by the Court in its overruling of the Board's decision.[61]

The dissenting opinion written by Mr. Justice White, with whom Justices Brennan and Blackmun joined,[62] found the majority's postulations insufficiently persuasive to warrant denying the Board the broad discretion it is entitled to in regulating elections.[63] Especially where a conditional exemption from a mere ten dollar fee is concerned, the dissent properly stated that the voter's decision is unlikely to be significantly affected,[64] even if the employee thought that the way he voted would affect the economic benefit to be received from the waiver of initiation dues.[65] Because there were such persuasive arguments to disprove the theory that the union waiver affects the employee's free choice at the polls, the dissent concluded that this issue was one best resolved by the application of administrative expertise and discretion.

> There is certainly a conflicting interest between the union's right to make itself attractive to employees without misrepresentation and the employee's unfettered choice to vote for or against the union. . . . [I]t is rational for the Board to conclude on the basis of the facts presented that the decision of the Union to waive small fees was not coercive . . . .[66]

The Court's decision in *Savair Manufacturing* appears unjustified in light of the argument that the union's conditional waiver of initiation dues for those signing cards before the election does not materially affect the voting decision. Moreover, the Board is normally afforded broad discretion in the regulation of elections. The Board has been entrusted with the task of encouraging the statutory policy of promoting the use of collective bargaining,[67] which necessarily requires the protection of legitimate campaign tools used by unions to organize the employees.[68] The Court re-

[60] Id. at 277-78.
[61] Id.
[62] Id. at 281.
[63] The Supreme Court has repeatedly recognized the great amount of discretion afforded the Board's determinations as to proper regulations necessary to ensure fair elections. E.g., NLRB v. A.J. Tower Co., 329 U.S. 324, 330 (1946).
[64] 414 U.S. at 284-85.
[65] Id. at 289.
[66] Id. at 290.
[67] 29 U.S.C. § 151 (1970).
[68] 414 U.S. at 285 n.4.

stricted the methods by which the collective bargaining option is presented to the employees, without providing an evidentiary rationale for overturning the Board's policy. Thus, *Savair Manufacturing* unreasonably restricts the Board's effort to promote the statutory policy favoring collectivization without compromise of the employees' exercise of a free and fair choice in selecting that option. The *Savair Manufacturing* decision argues for a curtailment of Board discretion, thus further encouraging litigation, which can only lead to a substitution of judicially desired policies for those labor policies reasonably fashioned by a labor board experienced in the regulation of elections.

2. *Board Procedure:* Modine Manufacturing

As was apparent in *Savair Manufacturing,*[69] the proper allocation of responsibility between the Board and the judiciary for determining the proper labor policies to be applied in the representation area is a matter of continual concern. In an important Survey year decision, *Modine Manufacturing Co.,*[70] the Board sought to increase judicial deference to the discretion exercised by the Board in adjudicating objections to the results of Board-conducted elections.[71] The authority of the judiciary to review Board decisions, denying the election challenger a hearing upon his claims of election interference, was not questioned.[72] However, the Board did seek to present compelling arguments for deference to its discretion to a judiciary currently contemptuous of the Board method of handling election challenges.[73]

In *Modine Manufacturing,* the winner of the election had been certified as the employees' collective bargaining representative. Prior to the certification, the Board had received the Regional Director's report of the investigation into complaints of union misrepresentations allegedly made during the last minute before the election.[74] The Board concluded that the objections did not allege "substantial and material issues," which would entitle the employer to a hearing.[75] Having been charged with violating his section 8(a)(5)

[69] See text supra at notes 65-68.

[70] 203 N.L.R.B. No. 77, 83 L.R.R.M. 1133 (1973).

[71] 29 U.S.C. § 159 (1970) authorizes the Board to conduct elections among employees in order for them to select, by majority will, their collective bargaining representative. While the Act specifies no duty of the Board to conduct hearings upon post-election objections, the Board has ordered hearings in certain cases as a means of administering fair and free elections. 203 N.L.R.B. No. 77, 83 L.R.R.M. at 1135.

[72] 83 L.R.R.M. at 1135.

[73] Id. at 1134.

[74] Id. at 1133-34.

[75] Id. at 1134. Under Board promulgated rules, post-election objections warrant a hearing if they contain allegations raising "substantial and material issues." 29 C.F.R.

duty to bargain with the certified representative of the employees, the employer sought to relitigate his claim of right to hearing, asserting this right as an affirmative defense to the section 8(a)(5) unfair labor practice complaint.[76] Since the Board unanimously[77] decided that its original decision to dismiss the objections and refuse the petition for a hearing was correct, it dismissed, as an attempt to relitigate an issue already litigated, the employer's claim of denial of a hearing as a defense to the unfair labor practice complaint.[78] The significance of the case lies in the Board's arguments put forth to justify its initial refusal to direct a hearing upon the election challenges.

Standards for determining which allegations of election misconduct are sufficient to merit a post-election hearing were announced in the Board's 1962 decision in *Hollywood Ceramics Co.*[79] There, it was held that last minute, pre-election misrepresentations constituting a substantial departure from the truth and which could reasonably be expected to have a significant impact upon the election would warrant invalidating the results of the election.[80] Thus, *Hollywood Ceramics* established standards of election invalidation for determining whether a hearing is merited. In *Modine Manufacturing,* the Board propounded legal and pragmatic reasons why the judiciary should exercise restraint in overruling Board judgments as to whether the allegation contained in the objections state circumstances meeting the *Hollywood Ceramics* standards. Among the pragmatic reasons advanced by the Board as warranting increased judicial deference to the Board's decisions was the need to adjust judicial policies to the nearly unlimited demands placed upon the Board's limited resources.[81] The Board conducts 9,000 elections, in which many of the campaigns are hard fought; and thus fertile soil for allegations of election misconduct.[82] Therefore, the Board explained that it must be given sufficient latitude to determine which objections justify the expenditure of its own time and resources.[83] Since it must allocate the limited amount of public funds as efficiently as possible, the Board indicated that judicial orders to the

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§ 102.69 (1973). See Hollywood Ceramics Co., 140 N.L.R.B. 221, 224, 51 L.R.R.M. 1600, 1601 (1962).

[76] 83 L.R.R.M. at 1133-34.

[77] The entire membership of the Board voted to hold that its original decision in the representation case was correct. Member Kennedy concurred. 83 L.R.R.M. at 1138.

[78] Id. at 1133-34.

[79] 140 N.L.R.B. 221, 51 L.R.R.M. 1600 (1962).

[80] Id. at 221-22, 51 L.R.R.M. at 1601-02.

[81] 83 L.R.R.M. at 1135.

[82] Id.

[83] Id. at 1135-36.

Board to conduct representation hearings would interfere with resources otherwise directed toward adjudicating unfair labor practice complaints.[84]

The courts should not hasten to direct hearings, the Board further cautioned, because the hearings often are unreliable in determining the actual impact of the challenged conduct on the voting.[85] Moreover, hearings unnecessarily interfere with the commencement of collective bargaining. Certification of the election winner bars another election only for one year, a time period which may, in any case, be consumed by post-election hearings.[86] Thus, the postponement of collective bargaining caused by the hearings may not yield any benefit, since a second election may be awaiting the outcome of the hearing. These practical considerations, in the opinion of the Board, justify use of what it considers an "administrative" test of objections sufficient to meet *Hollywood Ceramics* standards for ordering a hearing. Thus, the Board considers that the proper test is whether the alleged misconduct would have a "tendency materially to mislead" the voters' minds rather than whether, upon the evidence developed at a hearing, the misrepresentations actually did have a significant impact upon the election votes.[87] Because of the need for an administrative rather than an evidentiary test, the Board felt its discretion should be given great weight: "The existence of a tendency is a matter calling for the exercise of our own administrative expertise, rather than something which is susceptible to development through an evidentiary hearing."[88]

The distinction in these tests may be revealed by noting one particular area where the Board's "administrative" test and the courts' evidentiary "actual impact" test collide. In reaching their decisions, the courts have noted that the closeness of the election tallies have encouraged the courts to direct the Board to order hearings.[89] The Board, on the other hand, feels that a close vote indicates that the misconduct was not material, since if it were, it would likely have caused a lopsided vote.[90] The courts' approach however, substitutes for the Board's administrative "tendency" test, a test of actual impact upon voter choice. Board utilization of such a

[84] Id.

[85] Id. at 1136-37.

[86] Id. at 1136. 29 U.S.C. § 159(c)(2) (1970) makes a valid election a bar to a subsequent election in the bargaining unit for a period of one year.

[87] 83 L.R.R.M. at 1137.

[88] Id.

[89] E.g., 48 F.2d at 64, 85 L.R.R.M. at 2181. See 83 L.R.R.M. at 1137, where the Board stated that the closeness of the election results would support the denial of a hearing, since if the alleged misconduct was truly material to voter choice, the vote would more likely be lopsided.

[90] 83 L.R.R.M. at 1137.

test would result in direction of hearing in many cases where there was a close vote and objections were filed.

It is likely that a factual determination of what constitutes substantial misrepresentation, by an evidentiary inquiry into the extent the misconduct actually influenced voter choice, would be a prohibitively difficult and unreliable task. Thus, the Board's use of this administrative test to determine the right to a hearing appears warranted. However, Survey year decisions by several courts of appeals[91] have exhibited a continuing refusal to defer to the Board's judgments.

In both the cases affirming the Board's denial of a hearing[92] and in those reversing the Board[93] by ordering an evidentiary hearing, the courts of appeals have demonstrated a willingness to review in depth the reasons, if any, expressed by the Board for its refusal to conduct a hearing. This willingness to review these Board decisions critically requires the Board to delineate all the reasons it may have for its refusal, and thus places severe administrative burdens upon the Board.

C. *Board Jurisdiction:* Bodle*

Although the jurisdiction of the National Labor Relations Board extends to all employers whose operations affect commerce, nevertheless there is express congressional authorization for a Board refusal to assert its jurisdiction over a particular class of employers "where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction."[1] The Board's refusal to assert jurisdiction over a class of employers has a severe impact upon the organizational activity of employees of these employers since, without access to the Board, those employees are without the protections from employer

[91] NLRB v. Carlton McLendon Furniture Co., 488 F.2d 58, 85 L.R.R.M. 2177 (5th Cir. 1974); Thiem Indus., Inc. v. NLRB, 489 F.2d 788, 85 L.R.R.M. 2063 (9th Cir. 1973). Contra, Harlan No. 4 Coal Co. v. NLRB, 490 F.2d 117, 85 L.R.R.M. 2312 (6th Cir.), cert. denied, — U.S. —, 86 L.R.R.M. 2156 (1974); NLRB v. Shawnee Plastics, 492 F.2d 869, 85 L.R.R.M. 2308 (6th Cir. 1974).

[92] E.g., 490 F.2d at 123-25, 85 L.R.R.M. at 2314-18.

[93] 488 F.2d at 59-67, 85 L.R.R.M. at 2178-84.

* The authors wish to acknowledge the helpful research and comments on Board jurisdiction provided by Peter Moll of the Boston College Industrial & Commercial Law Review.

[1] 29 U.S.C. § 164(c)(1) (1970) states:

> The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided,* That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

interference[2] that would otherwise be guaranteed by Board application of the NLRA. Although the Board's refusal to exercise its jurisdiction permits the employees to request assumption of jurisdiction by the applicable state labor board,[3] state law may contain much weaker protection for employee representational and organizational activities.

During the Survey year, the Board rendered numerous decisions relating to the exercise of its jurisdiction. One of these cases, in which the Board declined to exercise jurisdiction over law firms as a class of employers,[4] is deserving of comment.[5] In *Bodle, Fogel, Julber, Reinhardt, & Rothschild,*[6] a three-member Board majority voted to decline to assert jurisdiction over law firms as a class of employers, although the dollar volume of revenue and dollar amounts of input into interstate commerce would permit it to assert jurisdiction.[7] The majority's decision to decline jurisdiction rested upon its view that the activity of law firms, although heavily involved in counseling and guiding clients to engage in transactions within or affecting interstate commerce, does not in itself so affect commerce in such a way that labor unrest within the law firms would interfere substantially with the flow of the interstate commerce in which law firms' clients are engaged.[8]

Although the majority's decision was largely based upon its reasoning that labor disputes within law firms as a class would not greatly interfere with the business of their clients, it also cited policy reasons for declining to assert jurisdiction. First, the majority opinion pointed out that "potential conflicts of interest are likely to develop if employees of law firms are to be represented by, and owe a substantial loyalty to an organization which may well have interests conflicting with those of clients whom lawyers represent."[9]

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[2] 29 U.S.C. § 158 (1970) contains specific prohibitions of employer interference with unionization among employees and imposes specific collective bargaining duties upon employers.

[3] 29 U.S.C. § 164(c)(2) (1970) states:

> Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

[4] Bodle, Fogel, Julber, Reinhardt & Rothschild, 206 N.L.R.B. No. 60, 84 L.R.R.M. 1321 (1973).

[5] Analysis of *Bodle* will be brief. A comprehensive treatment of the case exists in this issue of the *Law Review*. See Note, 15 B.C. Ind. & Com. L. Rev. 1313 (1974).

[6] 206 N.L.R.B. No. 60, 84 L.R.R.M. 1321. Chairman Miller, Members Kennedy and Jenkins were in the majority. Members Fanning and Penello dissented.

[7] 84 L.R.R.M. at 1322-23.

[8] Id. at 1322.

[9] Id. at 1323.

For example, in *Bodle,* the Teamsters Union sought to represent employees who had access to confidential information concerning labor unions-clients who were competitors of the Teamsters.[10] Second, the Board reasoned that delineation of dollar volume requirements for jurisdiction over law firms would be prohibitively difficult because of the difficulty of deciding which cases handled by the law firm affect interstate commerce. Thus, the Board concluded that administrative problems in deciding which law firms would fall within its jurisdiction warranted its refusal to assert jurisdiction.[11]

Bodle is the first case where the Board has decided to decline to assert jurisdiction over law fims as a class of employers.[12] However, a strong dissenting opinion of two Board members[13] indicates that the issue of the Board's jurisdiction over law firms may be decided in the opposite way when the composition of the Board changes.

II. Unfair Labor Practices

A. *Union Discipline*

1. *Fines Against Rank-and-File Strikebreakers:* Boeing; Booster Lodge; General Electric

Section 8(b)(1)(A) of the NLRA[1] defines the scope of a union's power to maintain adherence to its prescribed policies through disciplinary action against union members. Such discipline may be imposed in the form of monetary fines or restrictions upon future eligibility for union membership. The language of section 8(b)(1)(A) states that a union commits an unfair labor practice when it acts to "restrain or coerce employees in the exercise of the rights guaranteed" in section 7. Although section 7 guarantees to employees the freedom to refrain from concerted activities,[2] which include strikes,

[10] Id.

[11] Id.

[12] See Evans & Kunz, Ltd., 194 N.L.R.B. 1216, 79 L.R.R.M. 1181 (1972), where the Board had refused to assert jurisdiction on the narrow grounds that the law firm's dollar volume of business was insufficient to warrant its jurisdiction, and the decision was limited to the facts of that case.

[13] 84 L.R.R.M. at 1323 (dissenting opinion).

[1] 29 U.S.C. § 158(b)(1)(A) (1970) states:

> It shall be an unfair labor practice for a labor organization or its agents—
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> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title [section 7]: *Provided,* that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . . .

[2] 29 U.S.C. § 157 (1970) states:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or

nevertheless section 8(b)(1)(A) has been definitively interpreted by the Supreme Court as permitting union discipline of members who refrain from supporting a union-authorized strike.[3] That interpretation is valid, even though such discipline or threat thereof would, strictly speaking, restrain or coerce the employee in the exercise of his section 7 freedom to refrain from the concerted activity of striking. In a significant Survey year case, *NLRB v. Boeing Co.*,[4] the Supreme Court rendered a decision which may operate to further increase the power of the union to impose discipline upon strikebreakers without transgressing the limitations of section 8(b)(1)(A). The Court in *Boeing* eliminated the issue of the *reasonableness* of the amount of the fine from the scope of the Board inquiry when considering the validity of the fine under 8(b)(1)(A) standards.

In *Boeing*, the union had fined employee-union members $450 each and suspended them from eligibility for election to union office for five years as a penalty for crossing picket lines and returning to work during the union-endorsed strike.[5] After the union instituted a suit in state court against the strikebreakers to collect the unpaid fines, Boeing filed an 8(b)(1)(A) charge with the NLRB.[6] The charge asserted that the attempted court enforcement of such allegedly unreasonably large fines constituted "restraint or coercion" of the fined employees and thus fell within the prohibition of 8(b)(1)(A). The Board refused to consider the issue of the reasonableness of the amount of the fines, stating that such an issue was irrelevant to the lawfulness of union discipline.[7] On appeal, however, the court of appeals disagreed and remanded the case for Board determination of the reasonableness of the amount of the fines.[8]

In upholding the Board's refusal to rule on that issue, the Supreme Court in *Boeing* reviewed its prior research into the legislative intent underlying the formulation and enactment of 8(b)(1)(A). In *NLRB v. Allis-Chalmers Manufacturing Co.*,[9] decided in 1967, the Court had held that although section 7 of the Act guarantees the

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all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

[3] NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 195 (1967).

[4] NLRB v. Boeing Co., 412 U.S. 67 (1973). For a comprehensive analysis of *Boeing*, see Note, 15 B.C. Ind. & Com. L. Rev. 406 (1973).

[5] 412 U.S. at 69-70.

[6] Id. at 70.

[7] Booster Lodge 405, Int'l Ass'n of Machinists (Boeing Co.), 185 N.L.R.B. 380, 383 n.16, 75 L.R.R.M. 1004, 1007 n.16 (1970).

[8] Booster Lodge 405, Int'l Ass'n of Machinists v. NLRB, 459 F.2d 1143, 1161, 79 L.R.R.M. 2443, 2455 (D.C. Cir. 1972).

[9] 388 U.S. 177 (1967).

right to refrain from concerted activities such as strikebreaking, Congress did not intend 8(b)(1)(A) to remove the power of unions to impose fines against strikebreaker-members and to sue for collection. The *Allis-Chalmers* decision was not based on the proviso to 8(b)(1)(A), which guarantees the union power to prescribe and administer its own rules of eligibility for union membership. The Court noted that a suit to collect a union-imposed fine could not be fairly placed within the statutory proviso that pertains to union membership rules.[10] Instead, the Court in *Allis-Chalmers* based its holding that 8(b)(1)(A) did not prevent a union from suing to collect the fine upon its conclusion that Congress did not intend to use 8(b)(1)(A) to interfere in *internal union affairs,* at least to the extent of frustrating the union's use of discipline in its effort to maintain unity among employees and a strong bargaining position during a strike.[11]

Some discussion of a second Supreme Court decision sheds light on why the *Boeing* Court excluded the reasonableness of the fines from the section 8(b)(1)(A) standards. In a 1972-73 Survey year case, *NLRB v. Textile Workers Local 1029 (Granite State),*[12] the Supreme Court gave definition to the meaning of the term, *internal union affairs*. There, the Court affirmed the Board's decision that a union violated 8(b)(1)(A) by suing to collect a fine levied against strikebreakers who had resigned their union membership prior to engaging in the strikebreaking conduct. The *Granite State* Court reasoned that the immunity normally provided for internal union affairs was not applicable where the disciplinary action was taken to punish strikebreaking activities which had occurred after the employee had resigned from union membership; in that case the union was reaching beyond its internal affairs.[13] The Court reasoned:

> [T]he power of the union over the member is certainly no greater than the union-member contract. Where a member lawfully resigns from a union and thereafter engages in conduct which the union rule proscribes, the union commits an unfair labor practice when it seeks enforcement of fines for that conduct. That is to say, when there is a lawful dissolution of a union-member relation, the union has no more control over the former member than it has over the man in the street.[14]

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[10] Id. at 191-92.

[11] Id. at 195.

[12] 409 U.S. 213 (1972). For an analysis of *Granite State,* see Comment, 1972-1973 Annual Survey of Labor Relations Law, 14 B.C. Ind. & Com. L. Rev. 1173, 1224 (1973).

[13] 409 U.S. at 215, 217.

[14] Id. at 217.

Although the particular employees in *Boeing* had tendered no resignation before breaching the union rule against strikebreaking, and thus were not protected from discipline by the rule in *Granite State,* it was nevertheless argued that the union violated 8(b)(1)(A) because it sought to collect unreasonably large fines. In upholding the Board's finding that it did not have jurisdiction to entertain that contention, the Court in *Boeing* reasoned that a reading of the statute which would allow the issue of reasonableness to enter the case would result in excessive Board involvement in internal union affairs, contrary to the legislative intent behind 8(b)(1)(A).[15]

Noting that fines were generally analyzed as a penalty for the member's breach of membership contract with the union, the Court thought that the reasonableness of the fine was an issue more appropriate for the courts than for the Board, especially since a Board inquiry

> into the issue of reasonableness would necessarily lead the Board to a substantial involvement in strictly internal union affairs. While the line may not always be clear between those matters that are internal and those that are external, to the extent that the Board was required to examine into such questions as a union's motivation for imposing a fine it would be delving into internal union affairs in a manner which we have previously held Congress did not intend.[16]

Since state courts deciding union suits to collect fines have traditionally considered the reasonableness of the amount of the fine under contract theories, the *Boeing* Court saw no need to read into the Act a mandate for a parallel Board inquiry. The Court found the policy of establishing uniform national standards for union fines, through Board adjudication of the issue of reasonableness of the fines, without sufficient merit; the statute did not mandate that policy and the state courts were viewed as providing adequate protection against union abuse of the disciplinary power.[17]

One result of the *Boeing* decision may be that individual employees contesting the issue of the reasonableness of union fines will have to bear the expense of a defense in the court suit, rather than receiving the legal assistance of the NLRB General Counsel, who would otherwise file and argue an 8(b)(1)(A) unfair labor practice complaint. As Justice Douglas' dissenting opinion indicates, the union possesses great advantage over the individual employee in

[15] 412 U.S. at 74.
[16] Id.
[17] Id. at 74-78.

court.[18] Thus, *Boeing* appears to strengthen the disciplinary arm of the union, and therefore gives the union greater assurance of probable adherence to its strike policy. This in turn may permit unions to present a stronger bargaining position, since both they and management will realize that the union can present a more unified strike threat to back up its bargaining demands.

Although *Boeing* evidenced a broader judicial view of union power to collect fines, its companion Survey year decision by the Supreme Court, *Booster Lodge 405, International Association of Machinists v. NLRB (Booster Lodge),*[19] did reinforce one major existing limitation on the disciplinary arm of the union. The issue in *Booster Lodge* concerned the application and interpretation of the 1972 *Granite State* decision, which held that 8(b)(1)(A) prohibits court enforcement of union fines against employees who had resigned from the union before strikebreaking.[20] It was argued in *Booster Lodge* that a union rule against strikebreaking implies a union prohibition against an employee resignation designed to escape the obligation to the union to obey the rule; and that this implied prohibition against resignation renders the purported resignation unable to sever the member-union contractual relationship, upon which the union disciplinary power over the member is based.[21] The union contended that the promise of union members to abide by the union rule forbidding strikebreaking should be interpreted as a contractual promise by that employee not to circumvent the rule by a prior resignation designed to escape the obligation not to strikebreak, since it was a promise made while the member was in a contractual relationship with the union.

Emphasizing that *Allis-Chalmers* interpreted 8(b)(1)(A) as permitting fines only against strikebreakers holding *full union membership* at the time of the strikebreaking activity, the Court in *Booster Lodge* was unwilling to imply a union member's promise not to *resign* before strikebreaking, from the member's explicit contractual promise to obey a union rule against strikebreaking.[22] It is important to note that the Court stated that it did not decide the case where a specific union rule not only prohibited members from strikebreaking, but also from tendering a resignation.[23] In that hypothetical case, the issue would be whether the additional union rule against a resignation prior to strikebreaking would permit the union to enforce a fine in court for post-resignation strikebreaking.

[18] Id. at 79, 82 (dissenting opinion).
[19] Id. at 84 (1973).
[20] 409 U.S. 213, 217-18.
[21] 412 U.S. at 88-89.
[22] Id. at 89.
[23] Id. at 88.

It is submitted that, when faced with that issue, the Court will and should require the Board to find no 8(b)(1)(A) violation by the union. Such a specific union rule forbidding the resignation tendered prior to the act of strikebreaking should not take the situation out of the protected area of internal union affairs. The member's resignation in breach of his agreement to abide by the union rules should be considered ineffective to extricate him from union membership and its obligations. Thus, the statutory protection given by section 8(b)(1)(A) to internal union discipline would apply. Such a specific rule would put the strikebreaker-resignee on notice that he would be fined if he resigned in order to strikebreak. This rule would give the union member advance notice of the prohibition against such conduct, the absence of which in *Booster Lodge* was important to the Court's decision to refuse to recognize the union's power to collect the fine.[24]

Justice Blackmun, who wrote a concurring opinion in *Booster Lodge,*[25] made several arguments which would justify the protection of the union power to discipline a resignee whose resignation, prior to the strikebreaking, constituted a breach of an explicit union rule. In *Booster Lodge,* where no such rule existed, he argued that since the particular strikebreaker-resignee had voted in favor of a strike, voted to authorize fines, and initially participated in the strike, his conduct was sufficient to induce the reliance of fellow strikers, and thus constituted an implied promise to remain committed to the strike pact. These arguments are even more persuasive justification for validating the union discipline in a case where the specific union rule prohibiting resignation exists; in such a case the Court should permit the union discipline and prevent a Board-induced erosion of the strike weapon. Such a decision could be justified upon the *Allis-Chalmers* rationale that the union discipline is still primarily internal, and thus within the protection of the *Allis-Chalmers* rule.

The *Booster Lodge* decision confirms the current Board rule[26] that a *valid* union resignation serves to immediately cut off the power of the union to enforce its imposition of fines for strikebreaking after the resignation. It also precludes a finding that the resignation is invalid where no specific union rule prohibits a resignation followed by strikebreaking. However, a First Circuit decision during the Survey year has held that a valid union resignation does not remove the power of the union to punish strikebreaking by a suspension from membership eligibility, rather than by a monetary fine. In *NLRB v. District Lodge 99, International Association of*

[24] Id. at 89.

[25] Id. at 90-91 (concurring opinion).

[26] E.g., *Booster Lodge 405,* 185 N.L.R.B. at 383, 75 L.R.R.M. at 1007.

Machinists (General Electric),[27] the court denied enforcement of a Board order which had found an 8(b)(1)(A) unfair labor practice on the part of the union. In argument before the court, the Board had contended that the suspension discipline imposed for strikebreaking occurring after a resignation from the union constituted an unfair labor practice. The Board argued that such discipline implied that the union continued to have disciplinary power over the resignee, even after the resignation had worked a severance of the employee-union contractual relationship,[28] upon which the union's disciplinary power is based.

It is clear that the Supreme Court in *Booster Lodge* held that the union's freedom to enforce discipline in the form of *fines* ended when the member validly severed his contractual membership relationship with the union.[29] However, the First Circuit in *General Electric* found two reasons why discipline of strikebreaker-resignees imposed in the form of *membership suspension* was distinguishable from that imposed in the form of court enforcement of union fines. First, the five-year suspension merely constituted a ratification of the employees' voluntary severance of the membership relationship.[30] Second, even if the Board was correct in arguing that a suspension implies a continuation of union power over the resignee so as to violate the *Booster Lodge* rule, the proviso to 8(b)(1)(A) guaranteeing "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein"[31] protected the suspension discipline from attack.[32] The court not only pointed out that the suspension fell within the protection of the proviso, but also noted that the method of union enforcement of the suspension discipline was purely internal to the union.[33] The case was seen as factually distinguishable from *Booster Lodge,* where the union was prohibited from seeking the external aid of courts in enforcing its disciplinary fines against the strikebreakers.

> Thus, while § 7 may protect an employee from union control enforced by the courts or employers, the proviso of § 8(b)(1)(A) preserves a union's most basic power: that of granting or withholding membership. And it is this power

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[27] 489 F.2d 769, 771, 85 L.R.R.M. 2145, 2146 (1st Cir. 1974).

[28] Id. at 771, 85 L.R.R.M. at 2145-46.

[29] 412 U.S. at 85.

[30] 489 F.2d at 771, 85 L.R.R.M. at 2146, citing Pattern Makers' Ass'n, 199 N.L.R.B. No. 14, 81 L.R.R.M. 1177 (1972).

[31] 29 U.S.C. § 158(b)(1)(A) (1970).

[32] 489 F.2d at 771, 85 L.R.R.M. at 2146.

[33] Id. at 772, 85 L.R.R.M. at 2146.

> which extends over employees, such as those in the present case, who have resigned from membership.[34]

The decision of the court of appeals in *General Electric* seems quite logical. If the proviso to section 8(b)(1)(A) has any value, it should be construed to allow the union to affirm a resignation through union discipline imposed in the form of suspension from membership eligibility. Any other decision would seem to violate the legislative intent of Congress to restrain interference with internal union affairs, and would severely undermine the union's ability to retain a loyal membership and hence, its ability to function as an effective bargaining representative.[35]

Past decisions of the Board have held that where the union imposes discipline upon a member who worked during a union-authorized strike which violated a no-strike contract provision, it commits an 8(b)(1)(A) unfair labor practice.[36] In a Survey year decision, *Local 1127, Communication Workers (New York Telephone Co.),*[37] the Board extended this rule by holding that union imposition of fines was also unlawful where the strike was violative of the sixty day notice provisions of section 8(d) of the Act.[38] In this case, the union had struck before the completion of the obligatory notice period of sixty days from the time the union notified the telephone company of its intent to negotiate a new contract. Thus, the strike was unprotected because of the violation of section 8(d), and the Board found that this fact abrogated the power which the union would ordinarily have to discipline strikebreakers.[39] In the companion opinion to *New York Telephone Co., Local 1101, Communication Workers,*[40] arising out of the same fact situation, the Board held that as long as the section 8(b)(1)(A) complaint of unlawful union discipline alleged that the discipline to punish strikebreaking was imposed within the six month statute of limitation period for unfair labor practice charges,[41] the complaint was not barred by the

[34] Id.

[35] See *Allis-Chalmers,* 388 U.S. at 183-84.

[36] E.g., Glaziers Local 1162 (Tusco Glass, Inc.), 177 N.L.R.B. 393, 73 L.R.R.M. 1125 (1969); Local 12419, UMW (National Grinding Wheel Co.), 176 N.L.R.B. 628, 71 L.R.R.M. 1311 (1969).

[37] Local 1127, Communication Workers (New York Tel. Co.), 208 N.L.R.B. No. 31, 85 L.R.R.M. 1102 (1974).

[38] 29 U.S.C. § 158(d)(4) (1970) provides that a party desiring termination or modification of the collective bargaining agreement must give written notice sixty days prior to the termination date or date of proposed modification, during which time the existing contract continues in full force and effect. The statute further prohibits the use of strikes during this sixty day period.

[39] 85 L.R.R.M. at 1102-03.

[40] 208 N.L.R.B. No. 32, 85 L.R.R.M. 1104 (1974).

[41] 29 U.S.C. § 160(b) (1970) requires that unfair labor practice complaints charge illegal activities which have occurred within six months prior to the filing of the charge.

statute of limitations solely because proof of the unlawful nature of a strike required evidence of the circumstances of a strike which had occurred outside the six month period of the statute of limitations.[42] The Board persuasively reasoned that it is the imposition of the discipline rather than the unlawfulness of the strike that constitutes the basis of the 8(b)(1)(A) complaint, and thus only the imposition of the discipline must fall within the limitation period.[43]

It is apparent from prior Board decisions[44] barring union discipline aimed at punishing strikebreaking during strikes which violated no-strike clauses that the Board considers these holdings essential to the discouragement of unlawful strikes. Thus, it appears to be a logical development for the Board to impose the same sanctions against a union which has struck in violation of the notice provisions of section 8(d). Furthermore, it is logical that a union not be permitted to use its disciplinary power to compel adherence to unlawful conduct.

2. *Fines against Strikebreaking Supervisors:* The Board and Courts of Appeals in Conflict

The National Labor Relations Act defines the meaning of supervisors[45] and distinguishes them from statutory "employees"[46] for purposes of the Act. Section 8(b)(1)(A) protects only "employees" from unlawful union discipline, and the section 7 delineation of individual rights protected by the Act applies only to "employees." Indeed, supervisors do not have the statutory right to join or form unions, because section 14(a) of the Act[47] gives the employer the right to insist that his supervisors abstain from union membership. However, many employers do permit supervisors to hold or retain union membership, a number of whom had reached that position

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[42] 85 L.R.R.M. at 1104-05.

[43] Id.

[44] Local 12419, UMW, 176 N.L.R.B. at 631-32, 71 L.R.R.M. at 1315.

[45] 29 U.S.C. § 152(11) (1970):

The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

[46] 29 U.S.C. § 152(3) (1970) defines the statutory meaning of the term "employee."

[47] 29 U.S.C. § 164(a) (1970):

Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this subchapter shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law either national or local, relating to collective bargaining.

after working in the rank-and-file.[48] As union members, such supervisors normally accept obligations to their fellow members, including the obligation to respect the union's strike picket line. Clearly, unless the supervisors are also union members, they have no duties to the union and they are not subject to its discipline.[49] The issue presently in controversy is whether a union may lawfully fine supervisors who are union members, where they have violated union rules by refusing to participate in a union-authorized strike and have crossed the picket line to perform rank-and-file struck work for their employer.

The effectiveness of a strike depends to a great extent upon the union's ability to cause a full cessation of the employer's operations. If unions are permitted to induce supervisor-members not to perform struck work through the threat of court-enforceable fines, one major result would be the increased effectiveness of the strike weapon as a tool to attain union bargaining demands. On the other hand, if the Act is finally interpreted as prohibiting discipline of supervisor-union members, employers may be more assertive in defending their bargaining positions because of the knowledge that a union strike will not be as effective in keeping supervisors from performing struck work and maintaining plant operations.

Section 8(b)(1)(B) states that a union commits an unfair labor practice where it acts to "restrain or coerce an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . . ."[50] It is the interpretation given to this section of the Act that controls in great part decisions relating to the lawfulness of union fines against supervisors. The Board has consistently held that union discipline of supervisor-members constitutes an unfair labor practice under section 8(b)(1)(B).[51] Yet Survey year decisions in three circuits have refused to enforce such decisions on the grounds that section 8(b)(1)(B) does not ordinarily exempt supervisor-members from union discipline meted out for strikebreaking.[52]

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[48] See IBEW v. NLRB, 487 F.2d 1143, 1148, 83 L.R.R.M. 2582, 2584, (D.C. Cir. 1973).

[49] See, e.g., NLRB v. Local 1029, Textile Workers, 409 U.S. 213, 214-17 (1972); NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 178-84 (1967).

[50] 29 U.S.C. § 158(b)(1)(B) (1970).

[51] E.g., Local 641, IBEW (Florida Power & Light Co.), 193 N.L.R.B. 30, 78 L.R.R.M. 1065 (1971); Local 134, IBEW (Illinois Bell Tel.), 192 N.L.R.B. 85, 77 L.R.R.M. 1610 (1971).

[52] Erie Newspaper Guild v. NLRB, 489 F.2d 416, 84 L.R.R.M. 2896 (3d Cir. 1973); Local 134, IBEW v. NLRB, 487 F.2d 1143, 83 L.R.R.M. 2582 (D.C. Cir. 1973) (en banc), rev'g on rehearing 487 F.2d 1113, 81 L.R.R.M. 2257 (D.C. Cir. 1972); NLRB v. Local 21, San Francisco Typographical Union, 486 F.2d 1347, 83 L.R.R.M. 2314 (9th Cir. 1973). Contra, NLRB v. Local 2150, IBEW, 486 F.2d 602, 83 L.R.R.M. 2827 (7th Cir. 1973).

Interpreting section 8(b)(1)(B), the Board has held that union discipline of supervisor-members for strikebreaking abridges the employer's 8(b)(1)(B) right to have loyal bargaining representation and grievance adjustment, and thus violates that provision of the Act.[53] The starting point for this Board interpretation, rejected by the Survey year courts of appeals, was its 1968 decision in *San Francisco-Oakland Mailers Union No. 18*.[54] There, a supervisor-member was disciplined by the union, not for performing rank-and-file struck work, but for his interpretation of the collective bargaining agreement as requiring certain work assignments that subsequently proved disagreeable to the union. The Board found that the union did not actually attempt to coerce the employer into *replacing* the disciplined supervisor, but nevertheless held that the union violated 8(b)(1)(B).[55] Noting that the union may not have literally coerced the employer into selecting a new collective bargaining representative to replace the one who was disciplined by the union, the Board conceded that the union's discipline did not expressly transgress the language of section 8(b)(1)(B), which prohibits union coercion in the *selection* of his collective bargaining and grievance adjusting representatives.[56] However, the Board reasoned that the discipline was unlawful because it would have the necessary result of causing the particular supervisor to perform his 8(b)(1)(B)-protected collective bargaining and grievance adjustment functions in a manner less loyal to the employer and more agreeable to the union, since the supervisor might reasonably consider this necessary to avoid future union discipline.[57] Under the Board's *Oakland Mailers* rationale, the union coerces "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances"[58] by imposing discipline which is likely to compromise the loyalty given by the supervisor-union members to their employer—a loyalty the Board views as guaranteed from union interference by section 8(b)(1)(B).[59]

Thus, *Oakland Mailers* announced an expansive Board interpretation of 8(b)(1)(B). Not only did it prohibit union discipline which coerces the employer's *selection* of his bargaining and grievance representatives, but it also prohibited discipline which tends to weaken the loyalty of the supervisor to the employer and which

[53] 193 N.L.R.B. at 31, 78 L.R.R.M. at 1066.

[54] Local 18, Int'l Typographical Union (Northwest Publications, Inc.), 172 N.L.R.B. 2173, 69 L.R.R.M. 1157 (1968).

[55] Id. at 2173, 67 L.R.R.M. at 1158.

[56] See id.

[57] Id. at 2174, 67 L.R.R.M. at 1158-59.

[58] Id. at 2173-74, 67 L.R.R.M. at 1158-59.

[59] Local 641, IBEW, 193 N.L.R.B. at 31, 78 L.R.R.M. at 1066.

arguably may result in a detrimental effect upon the supervisor's effective performance of collective bargaining and grievance adjusting functions on behalf of the employer.

Moreover, the Board, in decisions later reversed by Survey year courts of appeals decisions, greatly extended the *Oakland Mailers* rationale to the situation where supervisor-union members are disciplined for crossing a picket line to perform rank-and-file struck work, rather than for merely performing 8(b)(1)(B) collective bargaining and grievance adjustment functions in a manner disagreeable to the union.[60] In this line of cases,[61] the Board has decided that the unions had coerced the employer in violation of section 8(b)(1)(B) by fining the strikebreaking supervisors. Thus, the Board went beyond its *Oakland Mailers* decision by immunizing from union discipline supervisors performing rank-and-file struck work rather than their normal collective bargaining, grievance adjusting, or managerial work. The Board's rationale was that the threat of, or imposition of, union discipline upon supervisor-union members in order to induce respect for the union's strike will also induce respect for the union's position when the supervisors return to their supervisory, grievance adjusting and collective bargaining functions.[62] Thus, the conclusion drawn by the Board was that the ultimate result would be a more union-oriented slant to the future performance of supervisory functions. This, in turn, would cause unlawful coercion of the employer in the selection of his representatives.

In the Survey year decisions by the Third, Ninth and District of Columbia Circuits,[63] this Board interpretation of 8(b)(1)(B) was rejected. In *Local 134, International Brotherhood of Electrical Workers v. NLRB (Bell Telephone),*[64] the Court of Appeals for the District of Columbia Circuit, in a 5-4 en banc reversal of a prior panel decision,[65] held that section 8(b)(1)(B) did not prohibit the imposition of union discipline upon strikebreaking supervisor-members. The court reasoned that a possible deterioration of the loyalty of the supervisor to the employer as a result of union discipline was not only an unlikely possibility, but would, in any case, be

[60] E.g., Local 134, IBEW (Illinois Bell Tel.), 192 N.L.R.B. 85, 77 L.R.R.M. 1610 (1971).

[61] E.g., Local 641, IBEW, 193 N.L.R.B. 30, 78 L.R.R.M. 1065 (1971); Local 134, IBEW, 192 N.L.R.B. 85, 77 L.R.R.M. 1610 (1971); Local 2150, IBEW, 192 N.L.R.B. 77, 77 L.R.R.M. 1607 (1971).

[62] See 192 N.L.R.B. at 78, 78 L.R.R.M. at 1608-09.

[63] Erie Newspaper Guild v. NLRB, 489 F.2d 416, 84 L.R.R.M. 2896 (3d Cir. 1973); Local 134, IBEW v. NLRB, 487 F.2d 1143, 83 L.R.R.M. 2582 (D.C. Cir. 1973) (en banc); NLRB v. Local 21, San Francisco Typographical Union, 486 F.2d 1347, 83 L.R.R.M. 2314 (9th Cir. 1973).

[64] 487 F.2d 1143, 83 L.R.R.M. 2582 (D.C. Cir. 1973).

[65] 487 F.2d 1113, 81 L.R.R.M. 2257 (D.C. Cir. 1972).

a result which the employer was not entitled to challenge.[66] Since the District of Columbia Circuit expounded an analysis fuller than that of either the Third or Ninth Circuit, it will be given primary attention in this discussion.

In both Board decisions consolidated on appeal in *Bell Telephone,* the supervisors had been fined for performing rank-and-file struck work, rather than for performing their usual managerial functions.[67] Furthermore, the employers in both cases had waived their section 14(a) statutory right[68] to keep supervisors out of the union. The exercise of that employer right would have clearly immunized the supervisors from all union discipline, and thus would probably have insured the employer of supervisors untainted by union influence. It is likely to be clear to an employer that mere union membership among his supervisors may properly result in a growth on their part of some loyalty to the union, together with imposing upon them the duty to obey particular rules to which all members become obligated. Moreover, because of their union membership, the supervisor-union members receive valuable fringe benefits from the union, which not only induces greater attachment to the union, but also may give the union, as the source of those benefits, reasonable cause to demand some measure of allegiance. These factors were relevant to the District of Columbia's inquiry into whether, assuming the discipline did compromise the future loyalty of the supervisors to the employer, the employer was entitled to challenge that result.[69]

Additionally, in one of the two cases on appeal in *Bell Telephone,* the disciplined supervisors received the benefit of union bargaining representation; in that case the supervisors were also members of the bargaining unit, a situation to which the employer voluntarily, and contractually, consented.[70] As members of the bargaining unit, those supervisors were, and should logically have been expected to be, directly interested in the strike, which was authorized as a weapon for improving the conditions of employment for all the members of the unit;[71] yet the strikebreaking supervisors were engaging in conduct antagonistic toward their fellow union

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[66] 487 F.2d at 1155-57, 83 L.R.R.M. at 2589-92.

[67] Survey year Board decisions indicate that the Board continues to hold that union discipline to punish supervisors' performance of supervisory or managerial functions is prohibited by section 8(b)(1)(B). E.g., Local 6, N.Y. Typographical Union, 206 N.L.R.B. No. 83, 84 L.R.R.M. 1555 (1973); Pattern Makers' Ass'n, 203 N.L.R.B. No. 166, 83 L.R.R.M. 1261 (1973).

[68] 29 U.S.C. § 164(a) (1970).

[69] 487 F.2d at 1148-59, 83 L.R.R.M. at 2584-90.

[70] Id. at 1150, 83 L.R.R.M. at 2583-84.

[71] See id.

members and in breach of union rules. As a consequence of this conduct, the challenged fines were imposed.

The majority of the court in *Bell Telephone* pointed out that because the discipline in that case consisted of fines as well as expulsion from union membership, such discipline would more likely push the supervisor's loyalties towards the employer than towards the union, since the supervisor would no longer have union membership obligations.[72] Further, even assuming that the threat of strikebreaking discipline would weaken loyalty to the employer to the extent of inducing restraint from strikebreaking, the court did not agree that this would cause the supervisor to act favorably to the union when performing his section 8(b)(1)(B) functions of representation of the employer for purposes of collective bargaining and grievance adjustment.[73] The court thought it significant that the union discipline was imposed as a penalty for the supervisors' performance of rank-and-file work rather than the performance of their usual managerial functions:

> The dividing line between supervisory and non-supervisory work in the present context is sharply defined and easily understood. There is accordingly no reason to believe that by being forced to take sides with the union in a dispute unrelated to the performance of his supervisory functions, and to take sides only to the extent of withholding his labor from rank-and-file non-supervisory work, a supervisor will suffer from a change in attitude when, after the strike, he returns to the performance of his normal supervisory duties.[74]

Viewing the Board's interpretation of 8(b)(1)(B) as an unwarranted prejudice in favor of a labor policy which would assure that "supervisors who are permitted by their employer to join unions owe their undivided loyalty to their employer in any dispute between the union and the employer,"[75] the *Bell Telephone* court found no basis for such a policy either in the Act or in equity. Pointing to the Act, the court reasoned that if employers wished to retain the undivided loyalty of supervisors even during strikes, they could exercise their section 14(a) right to keep supervisors out of the union, or at least condition their waiver of that section 14(a) right upon a collective bargaining provision granting immunity to supervisor-union members[76] from union discipline imposed for performing

[72] Id. at 1156, 83 L.R.R.M. at 2590-91.
[73] Id. at 1157, 83 L.R.R.M. at 2591.
[74] Id.
[75] Id. at 1159, 83 L.R.R.M. at 2593.
[76] Id. at 1165, 83 L.R.R.M. at 2598.

rank-and-file struck work. Moreover, the court of appeals in *Bell Telephone* believed that the Board was unjustly undermining the contractual concept of the union-employee relationship, a concept seen as inherent in the policy of the Act.[77] The majority opinion pointed out that such undermining was a necessary consequence of Board protection for supervisors, since they were receiving economic benefits from their union membership without fulfilling the corresponding union obligations voluntarily assumed by them: "The Board's immunity from union discipline for strikebreaking supervisors makes a shambles of the mutuality of obligation implicit in the contract approach to union membership."[78]

In this respect the court's reasoning more logically comports with the statutory concept of the relationship between the union and the member, and also adheres to equitable principles. The contractual concept of union membership dictates that a duty is owed to the union by supervisors when they receive fringe benefits that may be improved by the strike, or when the supervisor is a member of the bargaining unit that is striking for improved conditions of employment. Thus, it is inequitable that the supervisor be allowed to obtain the ultimate gains of a strike while undermining the strike aimed at achieving those benefits. The court noted that supervisors, like rank-and-file union members, had the option of tendering a valid resignation if they desired to validly escape their membership obligation not to strikebreak.[79]

The *Bell Telephone* court persuasively reasoned that fairness not only demanded that supervisor-members fulfill the obligations of a union membership that either they or their employer could have prevented as a matter of statutory right, but also that equity within the union-employer relationship required the result that supervisors may be disciplined.[80] When the employer waived his section 14(a) right to require that employees shed their union membership upon promotion to supervisory positions, the employer acquired supervisors who receive, at the very least, those valuable union fringe benefits that are normally provided by employers. In addition the employer, in return for giving up his statutory right to non-union supervisors, received a pool of experienced supervisors, because he could induce rank-and-file employees to move up without requesting them to forfeit the union membership and the concomitant valuable economic benefits. It seems equitable that when the employer

[77] See NLRB v. Allis-Chalmers Mfg. Co., 388 U.S. 175, 182 (1967).

[78] 487 F.2d at 1167-68, 83 L.R.R.M. at 2600.

[79] See, e.g., Booster Lodge 405, Int'l Ass'n of Machinists v. NLRB (Booster Lodge), 412 U.S. 84 (1973).

[80] 487 F.2d at 1168-70, 83 L.R.R.M. at 2600-02.

waives his section 14(a) right and thereby acquires these benefits, he should not receive the assistance of the Board in insuring the supervisor's loyalty; at least in respect to those activities (such as strikebreaking) which are unrelated to the 8(b)(1)(B) collective bargaining representation and grievance adjusting duties.

It is submitted that the court of appeals decision in *Bell Telephone* that the union did not violate 8(b)(1)(B) by fining the strikebreaking supervisor-members is correct both in law and in equity. There is no reason to believe that union inducement of supervisors to encourage obedience to the strike-picket line will so compromise loyalty as to deprive the employer of future loyal representation in collective bargaining and grievance adjustment. The discipline may be just as likely to turn the supervisor against the union. Secondly, it seems equitable to restrain the employer from preventing supervisor-union members from fulfilling their membership obligations to the union when the employer: 1) waived his statutory right to use section 14(a) to achieve that end, and instead opted for the benefits of having union supervisors; and 2) nevertheless could have attempted to extract from the union a contractual promise not to discipline supervisors in these situations.

The *Bell Telephone* decision has been followed in two other Survey year courts of appeals decisions[81] and rejected in a third.[82] In one of the decisions which follows the rationale of the *Bell Telephone* majority, *Erie Newspaper Guild v. NLRB*,[83] the Third Circuit provided another limitation on Board policy in this area by restricting the class of supervisors who are immune from union discipline under the provisions of section 8(b)(1)(B). The court in *Erie Newspaper* reversed a Board finding that union discipline imposed upon a strikebreaking supervisor-member constituted an 8(b)(1)(B) coercion of the employer in his selection of his collective bargaining and grievance adjustment representatives. The record revealed no proof that the supervisor had actually performed the functions of grievance adjustment or collective bargaining or that the supervisor would do so in the future.[84] The Board's policy, as expressed in its *Erie Newspaper* decision,[85] had been to assume that a supervisor, as defined by section 2(11) of the Act,[86] automatically qualified as an employer representative for 8(b)(1)(B) purposes,

[81] Erie Newspaper Guild v. NLRB, 489 F.2d 416, 84 L.R.R.M. 2896 (3d Cir. 1973); NLRB v. Local 21, San Francisco Typographical Union, 486 F.2d 1347, 83 L.R.R.M. 2314 (9th Cir. 1973).

[82] NLRB v. Local 2150, IBEW, 486 F.2d 602, 83 L.R.R.M. 2829 (7th Cir. 1973).

[83] Erie Newspaper Guild v. NLRB, 489 F.2d 416, 84 L.R.R.M. 2896 (3d Cir. 1973).

[84] Id. at 420-22, 84 L.R.R.M. at 2878-2900.

[85] See id.; 197 N.L.R.B. No. 159, 80 L.R.R.M. 1364.

[86] 29 U.S.C. § 152(11) (1970).

without any evidence that the supervisor actually had performed or would likely perform collective bargaining or grievance adjustment functions for the employer. The court remanded the case to the Board for a finding by *substantial evidence* that the supervisor qualified as a section 8(b)(1)(B) representative of the employer. The court felt that this finding was a prerequisite to any ruling on whether the union fines of supervisor-members constituted an unfair labor practice.[87]

Thus, courts of appeals during the Survey year have sharply restricted the Board's definition of the scope of union discipline that is prohibited by 8(b)(1)(B). The Third Circuit in *Erie Newspaper* required that the Board protect from union discipline only those supervisor-union members who by evidence are shown to be representatives of the employer for purposes of collective bargaining and grievance adjustment. Along with the Third Circuit, the District of Columbia Circuit and the Ninth Circuit[88] have held the Board not entitled to prohibit, under section 8(b)(1)(B), union discipline imposed upon supervisors for performing rank-and-file struck work. The Seventh Circuit has held the Board correct in prohibiting such discipline.[89] Because of the significance of the issue, the Supreme Court should grant certiorari and resolve the conflict between the Board and the circuit courts. Once the issue is authoritatively resolved, management and unions can attempt to fulfill their respective needs by negotiating collective bargaining agreement provisions regulating the union's disciplinary power over supervisors who are also union members.

B. *Employer Interference and Discrimination*

1. *Solicitation/Distribution:* Magnavox

In a major Survey year decision, *NLRB v. Magnavox Co.*,[1] the Supreme Court handed down a decision likely to result in a marked increase in the amount of solicitation/distribution activities carried on by employees at their place of work. The Court decided that an employer-union contractual provision denying employees' the right to engage in solicitation/distribution concerning the selection or retention of their bargaining representative is not a valid waiver of

[87] See 489 F.2d at 427, 84 L.R.R.M. at 2904.

[88] NLRB v. Local 21, San Francisco Typographical Union, 486 F.2d 1347, 83 L.R.R.M. 2314 (9th Cir. 1973).

[89] NLRB v. Local 2150, IBEW, 486 F.2d 602, 83 L.R.R.M. 2829 (7th Cir. 1973).

[1] — U.S. —, 94 S. Ct. 1099, 85 L.R.R.M. 2475 (1974), rev'g 474 F.2d 1269, 82 L.R.R.M. 2852 (6th Cir. 1973).

that right. Resolving a conflict among several circuits,[2] the decision affirmed the Board's finding of a violation of section 8(a)(1).[3] The employer had enforced a company no solicitation/no distribution rule against employees expressing support of the union which had executed the contractual waiver.[4] The Supreme Court indicated that the union's contractual waiver of the solicitation/distribution rights of the employees did not authorize the employer to limit unlawfully the exercise of those rights by *supporters* of the current union. Furthermore, the scope of the Court's decision necessarily incorporates the rule that the union's contractual waiver will not authorize employer interference with the rights of those employees expressing *opposition* to the retention of the incumbent union as the bargaining agent.[5]

Section 7[6] of the NLRA guarantees to employees the right to engage in concerted activities, and to form and join labor organizations for the purposes of collective bargaining. Section 7 has long been construed to allow employees to solicit union support and distribute union literature at their place of work.[7] In defining the scope of the lawful exercise of these employee activities, the Board and courts have recognized the rights of employers to maintain plant discipline and order. It has been necessary for the Board and the courts to balance section 7 solicitation/distribution rights against employers' legitimate business needs. This balancing process has resulted in the formulation of presumptions of the validity or in-

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[2] The Sixth Circuit's decision in *Magnavox* denied enforcement of the NLRB § 8(a)(1) order against the employer. 474 F.2d 1269, 82 L.R.R.M. 2852 (6th Cir. 1973). That decision conflicted with those reached in the Eighth Circuit and the Fifth Circuit. Both International Ass'n of Machinists v. NLRB, 415 F.2d 113, 72 L.R.R.M. 2206 (8th Cir. 1969), and NLRB v. Mid-States Metal Prods. Inc., 403 F.2d 702, 69 L.R.R.M. 2656 (5th Cir. 1968) enforced similar Board orders on the ground that the union did not have authority to waive employees' solicitation/distribution rights pertaining to the selection of the collective bargaining representative.

[3] 29 U.S.C. § 158(a)(1) (1970) states: "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title . . . ." Section 157, 29 U.S.C. 157 (1970), states:

> Employees shall have the right to self-organization, to form, join, or assist labor organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

[4] Magnavox Co., 195 N.L.R.B. 265, 266, 79 L.R.R.M. 1283, 1284-85 (1972). The Board detailed presumptions of validity and invalidity for employer rules pertaining to solicitation/distribution in Stoddard-Quirk Mfg. Co., 138 N.L.R.B. 615, 51 L.R.R.M. 1110 (1962).

[5] 94 S. Ct. at 1102, 85 L.R.R.M. at 2476.

[6] 29 U.S.C. § 157 (1970).

[7] See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798 (1945).

validity of those employer plant regulations placing limits on solicitation/distribution activity. These presumptions, which turn on whether the employers' rules limit activity during working or non-working time, or in working or non-working areas of the plant, were authoritatively announced by the Board in 1962 in *Stoddard-Quirk Manufacturing Co.*[8]

In *Magnavox,* the collective bargaining provision contained a purported union authorization of employer solicitation/distribution regulations which presumptively would have been invalid under *Stoddard-Quirk* standards, since those rules prohibited activity on the employees' non-working time and in non-working areas of the plant.[9] The issue in *Magnavox* was whether the contractual authorization of this broad no solicitation/no distribution rule permitted the employer to enforce the otherwise invalid regulations against employees seeking to exercise their solicitation/distribution rights in *support* of the union that had contractually authorized the regulations by waiving those rights. In its 1963 *Gale Products*[10] decision, the Board had held that the employer is not protected by a union contractual authorization of employer interference with employee's Section 7 right to advocate *opposition* to the union's retention as the collective bargaining agent. However, in *Gale Products,* the Board's decision was seen as necessary to prevent an incumbent union from freezing out competition by executing a contractual waiver of solicitation/distribution rights in order to stifle expression of opposition to the retention of the union as the bargaining agent. Thus, the *Gale Products* rule constituted what was considered a necessary exception to the general principle that agreements executed by the union in good faith bind all the employees represented by it.[11]

The Court in *Magnavox* extended the scope of employee protection from union-employer contractual waiver of solicitation/distribution rights beyond that provided by *Gale Products.* The Court specifically held that employees expressing support for the union were entitled to protection from employer interference purportedly sanctioned by the collective bargaining agreement.[12] Rather than viewing the pro-union or anti-union status of the employees as of great weight in evaluating the validity of the union's contractual

[8] 138 N.L.R.B. 615, 51 L.R.R.M. 110 (1962). Employer regulations purporting to limit these rights are presumptively valid if the limitation is only during working time or in working areas, and presumptively invalid if they extend to non-working time and non-working areas of the plant.

[9] 94 S. Ct. at 1101-02, 85 L.R.R.M. at 2476.

[10] 142 N.L.R.B. 1246, 53 L.R.R.M. 1242 (1963).

[11] See id. at 1248, 53 L.R.R.M. at 1243-44.

[12] 94 S. Ct. at 1102, 85 L.R.R.M. at 2476.

authorization of the otherwise unlawful employer interference, the Court saw as determinative the special nature of the employee rights the union had attempted to waive by contract. A distinction was made between the union's waiver of employee economic rights, such as the right to strike, and the union's attempted waiver of the fundamental right of the employees to advocate and express their choice of a collective bargaining representative.[13] The Court reasoned that union authority to bargain away such fundamental rights could seriously diminish the employees' statutory right to select the bargaining representative which is guaranteed by section 9(a) of the NLRA.[14]

The rationale of the *Magnavox* decision was that solicitation/distribution rights are determinative of the ability of employees to freely choose their representative. This reasoning was adopted from the Board's *Gale Products* decision.[15] However, in *Magnavox* the Supreme Court extended *Gale Products* and concluded that the rights of those employees who choose to advocate support of the union that had waived their solicitation/distribution rights should be entitled to protection equal to that afforded those who wish to express opposition to the union. In the *Gale Products* decision, the Board had held that "neither an employer nor an incumbent union is entitled, absent special circumstances which do not appear here, to freeze out another union by trenching on the statutory rights of employees to engage in protected activities."[16] The rationale in that case was that the NLRA does not sanction a union's use of the collective bargaining process to guarantee, against all challenge, its elected position as the bargaining representative.

The opinion of Mr. Justice Stewart, concurring in part and dissenting in part, agreed with the *Gale Products* holding that the union has no authority to muzzle opposition by agreeing to employer removal of their solicitation/distribution rights.[17] However, he saw the Court's extension of protection to union supporters, despite the union's contractual authorization of the employer interference, as creating serious inequities. He pointed out that the Court's decision bestowed a windfall upon the union by allowing it to receive the

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[13] Id.

[14] 29 U.S.C. § 159(a) (1970):

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining . . . .

[15] See 142 N.L.R.B. at 1249, 53 L.R.R.M. at 1244.

[16] Id.

[17] 94 S. Ct. at 1103, 85 L.R.R.M. at 2477.

benefit of the employer's concessions without sacrificing what was presumably the quid pro quo for the employer's concessions—the union's waiver of solicitation/distribution rights of its supporters.[18]

Mr. Justice Stewart properly noted that some degree of interference with the collective bargaining process occurs whether union supporters or union opponents are permitted to escape the employer's enforcement of the contractual provision relating to solicitation/distribution activities. He found it possible to justify that degree of interference with the integrity of collective bargaining agreement that results from the ability of union opponents to avoid the sweep of the union's contractual waiver. The justification was the need to protect the "policy of the labor law [that] forbids either the union or the employer to freeze out another union or to entrench the incumbent union by infringing the section 7 rights of dissident employees."[19] In the *Magnavox* factual situation, however, the fact that the union supporters were permitted to avoid the contractual waiver allowed the union to receive campaign support which it had bargained away in the contract.

Despite the substantiality of the arguments advanced by Mr. Justice Stewart, it is submitted that the *Magnavox* decision is correct. It was the section 7 right to engage in activities relating to the choice of a collective bargaining representative that justified the *Gale Products* protection of solicitation/distribution by union opponents. Since that statutory right accrues to the individual employee, protection of that right from contractual waiver should be afforded to all employees, whether they support or oppose the current collective bargaining representative. If the Court had limited its holding to protection of employees opposing the retention of the incumbent union as the bargaining representative, that particular segment of the bargaining unit would have a right of access to the employee-electorate that union supporters would not have. This result would be likely to have a significant effect on the solicitation/distribution rights of union supporters.

Supporters of the union may themselves be in the minority and thus it may be especially necessary for them to retain solicitation/distribution rights in the face of the union's contractual waiver of those rights in order to participate effectively in the choice of bargaining representatives. Further, to hold union supporters bound by the union's contractual waiver would ignore the fact that the primary benefit of solicitation/distribution rights is the power thereby given to employees to affect the choice of a bargaining

[18] Id. at 1103-04, 85 L.R.R.M. at 2478.
[19] 142 N.L.R.B. at 1249, 53 L.R.R.M. at 1244.

representative.[20] On the basis of this fact, employees who support the incumbent union should be distinguished from the union itself for purposes of protecting these rights.

The criticism that the *Magnavox* approach bestows a windfall upon the incumbent union is of limited validity. Although the windfall may be gained by the particular union involved in the *Magnavox* case, such a windfall will not likely be gained by other unions. Employers will be put on notice by *Magnavox* that concessions should not be exchanged for a union's contractual waiver of solicitation/distribution rights of either union supporters or opponents, since the *Magnavox* rule will prohibit the employer from enforcing such a contract provision.

While extremely significant, the effect of *Magnavox* upon the law of solicitation/distribution is not all-encompassing. The case does not reach three areas of that law. First, *Magnavox* will not affect employers' rights to enforce plant rules which are lawful limitations on plant solicitation/distribution activity under the *Stoddard-Quirk* standards. The case dealt only with the employer's attempt to enforce otherwise invalid plant solicitation/distribution rules that were agreed to by the employees' collective bargaining representative. Secondly, the decision will not likely be applied so as to prohibit employer enforcement of the waiver of the distribution of the incumbent union's institutional literature.[21] Since a large degree of plant solicitation/distribution may involve the union's own literature, the employer's ability to enforce its contractual waiver under these circumstances may constitute a large area free from the sweep of the *Magnavox* decision. Thirdly, the *Magnavox* holding does not forbid employer enforcement of the union's waiver of solicitation/distribution not concerned with the selection of the collective bargaining representative. Although most solicitation/distribution activity probably is within with this area, the employer is still entitled to enforce a contractual waiver of that activity when involved with matters extraneous to the representation of his employees.

2. *Economic Discrimination*

a. *Strikers' Reinstatement Rights*—In *Brooks Research and Manufacturing,*[22] a Survey year decision, the Board held that the statutory right of economic strikers to reinstatement by the employer continues for an indefinite period of time after the strike, at least

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[20] NLRB v. Mid-States Metal Prods. Inc., 403 F.2d 702, 704, 69 L.R.R.M. 2656, 2657-58. (5th Cir. 1968).

[21] 94 S. Ct. at 1104 n., 85 L.R.R.M. at 2477-78 n.

[22] 202 N.L.R.B. No. 93, 82 L.R.R.M. 1599 (1973).

where not otherwise limited by a collective bargaining agreement. The three member panel decided that an employer violates section 8(a)(3)[23] by attempting to disregard those rights by discontinuing maintenance of reinstatement hiring lists. In *Brooks Research,* a lawful economic strike ended when the majority of strikers, whose jobs had been taken by permanent replacements hired during the strike, made unconditional applications for reinstatement. The employer and union then composed a preferential hiring list to be used to fill jobs at the time the jobs would become vacant by departure of the permanent replacements. There was no discussion with respect to the duration of the use of the list. Nevertheless, about six months after the strike had ended, the employer notified the remaining unreinstated strikers that the company policy of terminating seniority of individuals who had been laid off for a period of six months dictated the loss of their reinstatement rights.[24]

In *NLRB v. Fleetwood Trailer Co.,*[25] the Supreme Court decided the issue of the *nature* rather than the *duration* of reinstatement rights of strikers. There, the Court held that the section 8(a)(3) prohibition of employer discrimination with regard to hire or tenure of employment, which would have the effect of discouraging union membership, required that the employer fill jobs remaining vacant after the end of strike by rehiring the strikers. The Court in *Fleetwood* reasoned that a refusal to reinstate a striker because of his participation in the statutorily protected activity of striking, rather than because of a valid business reason, would operate to discourage employees from maintaining union membership.[26] The employer in *Fleetwood* had justified his post-strike hiring of inexperienced employees in preference over the strikers on the ground that strikers need only be considered for rehire at the date of their reapplication, at which time the employer possessed no job openings. The Court disagreed,[27] noting that since strikers continued to be statutory employees despite their work stoppage,[28] their section 8(a)(3) rights to be free from job discrimination based on union membership could not be made to "depend upon the technicalities"[29] relating to the date of the strikers' reapplication for employment.

[23] 29 U.S.C. § 158(a)(3) (1970).

[24] 82 L.R.R.M. at 1600.

[25] 389 U.S. 375 (1967).

[26] Id. at 378.

[27] Id. at 380-81.

[28] 29 U.S.C. § 152(3) (1970) provides in part that the category of "employees shall include . . . any employee whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice and who has not obtained any other regular and substantially equivalent employment . . . ."

[29] 389 U.S. at 381.

The employer is not required to reinstate strikers where his failure to do so is based upon "legitimate and substantial business justifications"[30] such as the hiring of permanent replacements during the strike.[31] However, strikers have the right to reinstatement upon the departure of the permanent replacements.[32] In *Brooks Research,* the employer justified his termination of the reinstatement rights of the strikers upon the grounds that "it would be unreasonably onerous to require an employer to keep for an indefinite time records of strikers who might be eligible for reinstatement."[33] The Board rejected this as a valid business reason, noting that the clerical burdens imposed upon the employer are not sufficient to justify the resulting destructive effect upon the strikers' *Fleetwood Trailer* right to reinstatement.[34] The Board also ruled that changes in the employer's production techniques during the period of the strike do not constitute a valid business justification. The Board reasoned that the employer's subjective beliefs or speculation will not fulfill his burden of proof that the strikers were unqualified for their jobs where prior to the strike the employees had routinely adapted to changes in production techniques.[35]

Brooks Research is the first clear indication that the Board will not allow the employer to unilaterally place a time limitation upon the reinstatement rights of strikers.[36] It seems that the Board's decision is reasonable and necessary. Since the employer unlawfully discriminates when he refuses to rehire during the initial return to production period following the strike, it seems no less discriminatory when the refusal occurs at a time further removed from the end of the strike. Since the employer may have already lawfully hired permanent replacements for the strikers, it may be especially important that the strikers retain the right to regain their jobs for an indefinite length of time. Indeed, inability to acquire a comparable job, expiration of union or governmental unemployment benefits, and depletion of personal assets may create the greatest economic need for reinstatement at a time further removed from the strike.

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[30] NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967).

[31] NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345-46 (1938).

[32] Laidlaw Corp., 171 N.L.R.B. 1366, 58 L.R.R.M. 1252 (1968), enforced, 414 F.2d 99, 71 L.R.R.M. 3054 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970).

[33] 82 L.R.R.M. at 1601.

[34] Id.

[35] Id. at 1602.

[36] A union and employer may reach a collective bargaining agreement which would validly operate to set a time limitation upon the reinstatement rights. United Aircraft Corp., 192 N.L.R.B. 382, 77 L.R.R.M. 1785 (1971).

b. *Temporary Replacements for Locked-Out Employees:* Inter-Collegiate Press; Ralston Purina; Hess Oil

After bargaining to impasse with the union, an employer may lockout employees and then hire temporary replacements to continue production, according to a Survey year decision of the Court of Appeals for the Eighth Circuit. In this case, *Inter-Collegiate Press v. NLRB,*[37] the Eighth Circuit aligns with the Sixth Circuit[38] but is in opposition to the position of the Seventh Circuit, as it was expressed in 1971.[39] A narrow majority of the Board adopted the *Inter-Collegiate Press* position in two Survey year cases, *Hess Oil Virgin Islands Corp.*[40] and *Ralston Purina Corp.*[41] These decisions hold that an employer who advances valid business reasons for the use of temporary replacements, during what is an otherwise lawful lockout of the union employees, does not violate either sections 8(a)(1)[42] or 8(a)(3).[43] In *Inter-Collegiate Press,* the Eighth Circuit enforced a Board order[44] which dismissed an unfair labor practice complaint against an employer who produced school commencement diplomas and yearbooks.[45] Following an impasse in contract bargaining, the employer in *Inter-Collegiate Press* had locked out his employees in order to end the possibility of a precipitous strike during the upcoming peak business season. Having failed to receive a no-strike promise from the union one month into the lockout, the employer notified the union that temporary replacements would be hired and retained until a contract was signed or until the end of the peak season, whichever came first.[46]

In approving the employer's conduct, the Eighth Circuit reasoned that the employer's tactics were merely aimed at supporting his bargaining position and protecting his business from a strike that could cause severe disruption during the peak season. It suggested that the employer's notification to the union that the employees would be reinstated as soon as the contract was signed demonstrated that the employer did not seek to discourage union membership or to avoid his statutory duty to bargain with the

[37] 84 L.R.R.M. 2562 (8th Cir. 1973).

[38] Ottawa Silica Co. v. NLRB, 482 F.2d 945, 84 L.R.R.M. 2300 (6th Cir. 1973), enforcing mem. 197 N.L.R.B. No. 53, 80 L.R.R.M. 1404 (1972).

[39] Inland Trucking Co. v. NLRB, 440 F.2d 562, 76 L.R.R.M. 2929 (7th Cir.), cert. denied, 404 U.S. 858 (1971).

[40] 205 N.L.R.B. No. 3, 83 L.R.R.M. 1529 (1973).

[41] 204 N.L.R.B. No. 43, 83 L.R.R.M. 1341 (1973).

[42] 29 U.S.C. § 158(a)(1) (1970).

[43] 29 U.S.C. § 158(a)(3) (1970).

[44] Inter-Collegiate Press, 199 N.L.R.B. No. 35, 81 L.R.R.M. 1508 (1972).

[45] 84 L.R.R.M. at 2564.

[46] Id. at 2564-66.

union, but was essentially a weapon designed to strengthen his bargaining position.[47]

Upon the facts, the Eighth Circuit further concluded that the employer conduct did not so discourage the employees' exercise of their statutory right of self-organization as to be "inherently destructive" of that right.[48] Thus, the court imposed upon the Board the duty to present substantial, independent evidence of employer anti-union animus in order to find a section 8(a)(3) violation against Inter-Collegiate Press. The court felt evidence of anti-union animus was necessary to find a section 8(a)(3) violation in the use of this economic weapon where the employer action was apparently based on good business reasons.[49] For authority, the Eighth Circuit noted that the decision of the Supreme Court in *NLRB v. Great Dane Trailers Inc.*[50] held that economic weapons of employers are normally lawful where justified by valid and substantial business reasons, unless there is proof of employer anti-union animus. The only exception to this general rule of *Great Dane Trailers* was one which allowed the Board to proscribe, without proof of employer anti-union motivation and without regard to the business reasons for the use of the weapons, employer use of economic weapons that were "inherently destructive" of employee statutory rights.[51] That exception required no proof of anti-union animus in order to find that the employee violated section 8(a)(3). Holding that the lockout and subsequent use of temporary replacements was not within the "inherently destructive" category, the court in *Inter-Collegiate Press* decided that the general rule announced in *Great Dane Trailers* applied and resulted in the dismissal of the complaint against the employer, since there was no evidence of employer anti-union motivation.[52]

The union argued strenuously that the court should hold these economic weapons "inherently destructive" of employee rights; a decision which would create a per se rule and foreclose the need to show that the employer either lacked valid business reasons or possessed anti-union animus.[53] Though such a per se rule was established in 1971 by the Seventh Circuit in *Inland Trucking Co. v. NLRB,*[54] the Eighth Circuit chose to reject this approach. The

[47] Id. at 2567.
[48] 84 L.R.R.M. at 2567-68.
[49] Id.
[50] 388 U.S. 26, 34 (1967).
[51] Id. at 33.
[52] 84 L.R.R.M. at 2568-69.
[53] Id. at 2563-64.
[54] 440 F.2d 562, 76 L.R.R.M. 2929 (7th Cir.), cert. denied, 404 U.S. 858 (1971).

Eighth Circuit argued that any per se rule would impose unnecessary rigidity upon the development of the law regarding use of economic weapons, a result against which the Supreme Court has frequently warned.[55] Further, the court was inhibited from establishing such a rule[56] because the Board itself, after expert analysis, had refused to establish a per se rule that the use of temporary replacements for locked out employees is "inherently destructive" of employee statutory rights.[57]

Turning to the substantive issues, the Eighth Circuit concluded that establishment of this "inherently destructive" rule was unwarranted. First, because the impact of the challenged economic weapons would likely fall upon the bargaining position of the union, rather than upon the employees' allegiance to the union, the use of those weapons would not necessarily discourage the employees to maintain union membership in violation of section 8(a)(3).[58] Where, as in *Inter-Collegiate Press,* there is an established bargaining relationship between the parties, it appeared to the court that use of measures, announced as temporary,[59] would dislocate the union from its bargaining position rather than dislocate the employees from allegiance to the union.[60] This situation was found distinguishable from one in which the collective bargaining relationship is newly created and the union is attempting to prove itself deserving of the employees' allegiance. The court was confident of the persuasiveness of these arguments, since the Supreme Court, in *NLRB v. Brown Food Store,*[61] had propounded similar arguments in refusing to establish the per se unlawfulness of the use of temporary replacements for locked-out employees.

Assuming that the Eighth Circuit properly refused to categorize the use of a lockout followed by use of temporary replacements for the locked-out employees as employer conduct "inherently destructive" of employee statutory rights, its application of the general rule probably justified the decision. The lack of evidence of employer intent either to discourage union membership or to punish the employees for the exercise of their right to collectively bargain to impasse required that the court vindicate the employer. Since the employer had advanced valid business reasons for the use of the challenged tactics, no inference of such anti-union animus on the

[55] E.g., NLRB v. Erie Resistor Corp., 373 U.S. 221, 236 (1963).

[56] 84 L.R.R.M. at 2563-64.

[57] Inter-Collegiate Press, 199 N.L.R.B. No. 35, 81 L.R.R.M. 1508, enforced, 84 L.R.R.M. 2562 (8th Cir. 1973).

[58] 84 L.R.R.M. at 2567.

[59] Id. at 2565-66.

[60] Id. at 2567.

[61] 380 U.S. 278, 280-89 (1965).

part of the employer was available. Without evidence of such unlawful motivation, no section 8(a)(3) violation could fairly be found under the general rule.

The Board, in its two Survey year decisions, *Hess Oil*[62] and *Ralston Purina,*[63] also concluded that the general rule, and not the "inherently destructive" test, should be applied to fact situations similar to that present in *Inter-Collegiate Press*. However, three different positions were espoused by the Board members, who voted 3-2 in each case to hold unlawful the challenged economic weapons. A discussion of the different positions is relevant because the division within the Board indicates that the employer's use of these economic weapons in slightly different factual situations could lead to an opposite decision.

In *Ralston Purina,* the union and the company reached a bargaining impasse. After locking out his employees in order to bring economic pressure upon them to concede to company proposals,[64] a tactic concededly lawful,[65] the company then utilized supervisory and office personnel in order to temporarily continue production. The company felt this additional, temporary tactic was necessary to avoid spoliation of perishable material then part of the inventory.[66] In *Hess Oil,* the employer employed the same tactics to break the bargaining impasse, but did not advance any special needs, such as avoidance of inventory spoliation, as justification for the use of temporary replacements.[67] In neither case was there any evidence of anti-union animus on the part of the employers.

In writing the majority opinion in *Ralston Purina* and *Hess Oil,* Members Kennedy and Penello reiterated the view expressed in the 1972 Board decision, *Ottawa Silica Co.*[68] There, the Board relied upon the Supreme Court's decision in *NLRB v. Brown Food Store,*[69] and held that the employer's proof of legitimate business reasons for the use of a lockout and temporary replacements foreclosed the finding of a section 8(a)(3) violation against the employer.[70] In *Brown Food Store,* the Supreme Court rejected the "inherently destructive" rule in the case where the employer hired temporary replacements for locked-out employees. There, the local

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[62] Hess Oil Virgin Islands Corp., 205 N.L.R.B. No. 3, 83 L.R.R.M. 1529 (1973).
[63] Ralston Purina Co., 204 N.L.R.B. No. 43, 83 L.R.R.M. 1341 (1973).
[64] 83 L.R.R.M. at 1342.
[65] See American Ship Bldg. Co. v. NLRB, 380 U.S. 300, 309 (1965).
[66] 83 L.R.R.M. at 1342.
[67] Id. at 1529-30.
[68] 197 N.L.R.B. No. 53, 80 L.R.R.M. 1404 (1973), enforced, 482 F.2d 945, 84 L.R.R.M. 2300 (6th Cir. 1973).
[69] 380 U.S. 278 (1965).
[70] 80 L.R.R.M. at 1406-09.

union representing the locked-out employees was engaging in a whipsaw strike against a member of the employer's multi-employer bargaining association.[71] The Court refused to apply the "inherently destructive" label because the overwhelming evidence demonstrated that the employer was utilizing the lockout weapon only to combat the union's whipsaw strike and to maintain the bargaining position of the multi-employer association.[72]

> While the use of temporary nonunion personnel in preference to the locked-out union members is discriminatory, we think any resulting tendency to discourage union membership is comparatively remote, and that this use of temporary personnel constitutes a measure reasonably adopted to the effectuation of a legitimate business end.[73]

Thus, relying on both *Ottawa Silica* and *Brown Food Store,* Members Kennedy and Penello indicate that they would permit an employer to replace temporarily, locked-out employees if there were substantial business reasons for so doing and no employer anti-union motivation. Members Kennedy and Penello applied this test to the factual situations of *Ralston Purina,* and *Hess Oil,* and on the same test used by the Eighth Circuit in *Inter-Collegiate Press,* found no employer violation of section 8(a)(3).

The result advocated by Members Kennedy and Penello would not have occurred in *Ralston Purina* and *Hess Oil* except for the concurrence of Chairman Miller,[74] who took a somewhat different approach to the lawfulness of these economic weapons. Chairman Miller, as he fully articulated in the Board's decision in *Inter-Collegiate Press,*[75] would subject the challenged employer tactics to a rigorous inquiry, not being content to allow lack of anti-union animus or the presence of valid business reasons to automatically immunize the employer from a section 8(a)(3) violation. Pointing to the Supreme Court's *Brown Food Store* decision, Chairman Miller felt the Board was there instructed to "*balance* the impact of such economic weapons upon the possible discouragement of union membership against the importance and the legitimacy of the objectives of the employer."[76] Two factors were relevant to this balancing test: the employees' awareness that their lockout and replacement was temporary and merely a bargaining weapon, the injury from

[71] 380 U.S. at 283-84.
[72] Id. at 284.
[73] Id. at 288.
[74] 83 L.R.R.M. at 1342; 83 L.R.R.M. at 1529-30.
[75] 81 L.R.R.M. 1508, 1509-10.
[76] Id. at 1510.

which could at any time be attenuated by agreeing to the employer's contract proposals; and, the sincere belief on the part of the employer that use of the strike prevention weapons was essential—a possible strike timed to stop production during his peak season could deal a disastrous blow to his business.[77] Although Chairman Miller wrote no concurring opinion in either *Ralston Purina* or *Hess Oil,* it may fairly be assumed that the similarity in relevant factors between those cases and the *Inter-Collegiate Press* case caused him to concur separately with Members Kennedy and Penello.

Members Fanning and Jenkins dissented in both cases and advocated a third position.[78] They argued that the majority test of substantial valid business reasons and Chairman Miller's balancing test both are inapplicable where the employer executes a lawful lockout but then uses temporary replacements in order to continue production. The dissenters claimed that such employer conduct falls within the "inherently destructive" category. Thus, they believe that such action constitutes an unfair labor practice, despite the absence of proof of employer anti-union motivation and despite the evidence of employer business reasons for the use of the challenged tactics. In arguing in *Ralston Purina* for the adoption of the per se inherently destructive rule, Members Fanning and Jenkins conceded that the decision of the Supreme Court in *American Ship Building Co. v. NLRB*[79] immunizes the employer from a section 8(a)(3) unfair labor practice finding if the lockout was simply an economic weapon used by the employer to dislocate the union from its impasse bargaining position. However, the dissenters contended that when the employer himself avoids the economic consequence of his lockout by maintaining production through use of temporary replacements for the locked-out employees, the employer engages in conduct "inherently destructive" of his employees' section 7 rights.[80] Reasoning that the employer is destroying the employees' opportunity to earn while retaining that opportunity for himself,[81] the dissenters would characterize such conduct as automatically discouraging union membership, since union members must stand by while others earn their wages and the employer continues his business. Unlike the case of the strike, where the initiators of the work stoppage, intending to economically coerce the employer, also incur economic deprivation as well, the lockout combined with replacement of the locked-out

[77] Id. at 1510-12.
[78] 83 L.R.R.M. at 1343; 83 L.R.R.M. at 1530.
[79] 380 U.S. 300 (1965).
[80] 83 L.R.R.M. at 1343-44.
[81] Id.

employees gives the employer such a great economic advantage over the union employees as to discourage them from collectivizing and maintaining union membership.[82]

However, the position of Members Fanning and Jenkins was apparently rejected by the Supreme Court in *Brown Food Store*. There, the Court held that the Board would need to have substantial evidence of anti-union animus to find an 8(a)(3) violation, since use of *temporary* replacements for locked-out employees was viewed as not having a strong tendency to discourage union membership so as to place it within the "inherently destructive" category.[83] Since only two of the five Board Members presently espouse the per se rule, it appears that the rule will not govern cases until the Board composition changes. Furthermore, because adoption of the per se rule would require an analysis suitable for the "expertise" of the Board, the courts are unlikely to promulgate a rule not previously adopted by the Board, especially since *Brown Food Store* remains precedent.

Thus, the law in this area will turn on the particular facts of each case. Where the employer cannot show unique and important business justification such as the prevention of a devastating strike during the peak season, the prevention of spoliation of inventory, or the protection of a multi-employer unit from a whipsaw strike, Chairman Miller may be persuaded that the balancing test favors the union.[84] Thus, Chairman Miller, together with Members Fanning and Jenkins could form a Board majority that would limit the use of these economic weapons by an employer.

C. *The Duty to Bargain*

1. *Employer Withdrawal from Multi-Employer Bargaining Unit*

Two Survey year Board decisions, *Hi-Way Billboards, Inc.*[1] and *Associated Shower Door Co.*,[2] have indicated an increasing willingness on the part of the Board to limit the ability of an employer to withdraw from a multi-employer bargaining unit after the unit has already commenced bargaining with the union. The preservation of employer association-union bargaining has been recognized as important to national labor policy because this structure of collective bargaining appears to promote industrial peace.[3]

[82] 83 L.R.R.M. at 1344.

[83] 380 U.S. at 287-88.

[84] 83 L.R.R.M. at 1342; 83 L.R.R.M. at 1529.

[1] 206 N.L.R.B. No. 1, 84 L.R.R.M. 1161 (1973).

[2] 205 N.L.R.B. No. 95, 84 L.R.R.M. 1108 (1973).

[3] NLRB v. Local 449, International Bhd. of Teamsters (Buffalo Linen), 353 U.S. 87, 94-96 (1957).

Nevertheless, the Board has long held[4] that "unusual circumstances" may justify an employer's withdrawal from the employer association after the commencement of collective bargaining, and that union acquiescence to an otherwise unlawful employer withdrawal immunizes the employer from a section 8(a)(5)[5] violation for refusing to bargain. Since an untimely or unjustified employer withdrawal may frustrate the bargaining plans of the parties and thus severely disrupt the bargaining process, the definitions of "unusual circumstances" and "union acquiescence" are crucial in that those definitions will determine the limits of allowable employer withdrawal; and thus greatly influence the extent of disruption imposed upon the multi-employer bargaining process.

Board definitions of unusual circumstances have been traditionally limited to situations which confront the withdrawing employer with a realistic threat to survival of the business, such as proceedings in bankruptcy[6] or imminent plant closure due to unforeseeable economic conditions.[7] Mere severe injury to the employer's competitive position has not been placed within the scope of unusual circumstances.[8] In *Hi-Way Billboards,* an impasse in collective bargaining negotiations between the multi-employer association and the union was held not such an unusual circumstance as to permit the employer's withdrawal after the impasse arose. The decision was rendered after reversal by the Fifth Circuit, which had found[9] that the original Board decision[10] erred in its factual finding that no impasse had occurred. Noting that it was without the benefit of a Board decision on the effect of an impasse on the lawfulness of the employer withdrawal,[11] the circuit court remanded to the Board for its Survey year decision.

On remand, the Board examined the nature of a bargaining impasse, and unanimously agreed that such a situation is not an

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[4] Retail Associates, Inc., 120 N.L.R.B. 388, 395, 41 L.R.R.M. 1502 (1958).

[5] 29 U.S.C. § 158(a)(5) (1970) provides: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U.S. § 159(a) (1970) provides in pertinent part:

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

[6] United States Lingerie Corp., 170 N.L.R.B. 750, 751, 67 L.R.R.M. 1482, 1483 (1968).

[7] Spun-Jee Corp., 171 N.L.R.B. 557, 558, 68 L.R.R.M. 1121, 1122 (1968).

[8] See 84 L.R.R.M. at 1162 & nn. 13-14.

[9] NLRB v. Hi-Way Billboards, Inc., 473 F.2d 649, 82 L.R.R.M. 2527 (5th Cir. 1973).

[10] 191 N.L.R.B. 244, 77 L.R.R.M. 1461 (1971).

[11] 473 F.2d at 655, 82 L.R.R.M. at 2532.

unusual circumstance.[12] The Board reasoned that although the impasse temporarily suspends the parties' statutory duty to bargain, such a deadlock does not end the bargaining process. The use of economic weapons, such as strikes, lockouts, or employer-instituted alterations in working conditions, often results in a shift in the deadlocked bargaining positions, and thus revives the duty to bargain.[13] Thus, the Board concluded that an impasse is a predictable and normal event in the collective bargaining process, and does not itself sanction the withdrawal. The Board had previously held that a bargaining impasse together with union acquiescence will justify an employer withdrawal,[14] although there is dicta in an Eighth Circuit opinion indicating that an impasse alone will justify the withdrawal.[15] However, *Hi-Way Billboards* is the first Board decision holding an impasse insufficient to remove the section 8(a)(5) duty of an employer to retain membership in the multi-employer unit once bargaining has commenced, and to adhere to any resulting contract.

The *Hi-Way Billboards* decision seems correct in light of prior law in this area and in light of proper labor policy. The bargaining impasse does not threaten the survival of an employer's business, and thus does not constitute an unusual circumstance. Even if the impasse leads to a strike by the union, the strike would generally be called against the other members of the multi-employer bargaining association. Since those employers are normally competitors, the strike would have only a limited effect upon each employer's competitive position in the market. The Board's decision also protects the policy of encouraging the use of multi-employer units in collective bargaining. The ability of an employer to withdraw without the union's consent solely because of an impasse would not only penalize the union for its reliance upon this structure of bargaining, but would also penalize the remaining employers in the multi-employer unit, for whom the major benefit of this agreed-upon bargaining structure is solidarity among the original employer-members. Any other decision would discourage both union and employer entry into multi-employer unit bargaining.

Though *Hi-Way Billboards* suggests a trend of Board application of the unusual circumstances rule in a more stringent fashion, the Board has been criticized in this respect by dicta in a Survey

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[12] 84 L.R.R.M. at 1162-63.

[13] Id. at 1162.

[14] Teamsters Local 717, 145 N.L.R.B. 865, 55 L.R.R.M. 1059 (1964).

[15] Fairmont Foods Co. v. NLRB, 471 F.2d 1170, 1172-73, 82 L.R.R.M. 2017, 2018-19 (8th Cir. 1972).

year decision in the Seventh Circuit. In *NLRB v. Unelko Corp.*,[16] the Seventh Circuit did enforce a section 8(a)(5) order against an employer who withdrew from the multi-employer unit due to an asserted conflict of interest between the employer and the other members of the unit.[17] In enforcing the Board's order, the court relied on its agreement with the Board's factual finding that the employer was tardy in the notice of withdrawal to the union,[18] and thus held that the employer forfeited what the court felt was his right to withdraw after bargaining had commenced. However, in dicta, the *Unelko* court disapproved of the narrow interpretation given by the Board to the definition of unusual circumstances—an interpretation which resulted in the Board's finding that the employer's withdrawal constituted a section 8(a)(5) violation.

The withdrawing employer in *Unelko* had previously been a signatory to contracts between a multi-employer association and the union. The contracts contained provisions which allowed several of the participating employers to pay a certain class of employees a wage scale lower than that required of Unelko.[19] The favored employers, who, unlike Unelko, encountered stiff competition from southern firms, were given the special provision to insure their ability to compete. Unelko asserted its conflict of interest with these favored employers as sufficient justification for its withdrawal from participation in the current multi-employer unit after bargaining had already commenced. The opinion of the Administrative Law Judge, which was adopted by the Board,[20] had held that the conflict of interest is not such an unusual circumstance as would justify the employer's withdrawal, especially where the employer had been aware of that conflict long before agreeing to join the multi-employer unit in the current negotiations with the union.[21]

In light of the Board[22] and court policy[23] of promoting the integrity of multi-employer bargaining, the dicta in *Unelko* indicating approval of the employer's reason for withdrawal appears unjustified. If an employer can disrupt a bargaining structure that is voluntarily agreed upon by employers and the union simply because of an economic conflict with other members of the unit over contract

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[16] 478 F.2d 1404, 83 L.R.R.M. 2447 (7th Cir. 1973).

[17] 83 L.R.R.M. at 2450.

[18] Id.

[19] Id. at 2448.

[20] Unelko Corp., 195 N.L.R.B. 236, 79 L.R.R.M. 1328 (1972).

[21] Id. at 238-39, 79 L.R.R.M. at 1329.

[22] E.g., Retail Associates, Inc., 120 N.L.R.B. 388, 41 L.R.R.M. 1502 (1958).

[23] See NLRB v. Local 449, International Bhd. of Teamsters (Buffalo Linen), 353 U.S. 87, 94-96 (1957).

provisions, multi-employer units will be frequently destroyed during the negotiations with the union. Often, it is not until those negotiations have commenced and contract proposals are being reduced to contract provisions that an employer will finally be certain that the provisions are antagonistic to his self-interest and thus attempt to withdraw. It is precisely during the negotiations that an employer withdrawal is most destructive of the bargaining process. It is submitted that a mere conflict of interest asserted by an employer after bargaining has commenced should not justify his withdrawal from the multi-employer bargaining unit.

Although unusual circumstances will excuse employer withdrawal after bargaining has commenced, Board policy is that an otherwise unlawful withdrawal can nevertheless be excused if the union has acquiesced in the withdrawal.[24] The definition of union acquiescence, like that of unusual circumstances, has not been reliably determined,[25] but may be gleaned from a recent Board pronouncement in this area:

> [W]hen the union abandons its insistence on acceptance of the association contract, as such, and, instead, negotiates different terms or expresses its willingness to consider counterproposals, the Board readily has found that the union has acquiesced in the employer's abandonment of multiemployer bargaining.[26]

In a Survey year decision, *Associated Shower Door, Inc.*,[27] the Board significantly limited the scope of union conduct which will be termed "union acquiescence," and thus rendered a decision which severely curtails an employer's ability to lawfully withdraw.

Prior to *Associated Shower Door,* the most recent application of the law in this area had been made in *Fairmont Foods Co. v. NLRB*.[28] There, the union and multi-employer unit had reached a bargaining impasse due to the insistence of Fairmont upon a particular provision which the other employers were willing to forego.[29] Fairmont withdrew, and the union signed the contract, minus the objectionable provision, with the multi-employer unit. Subsequently, the union bargained individually with Fairmont over economic issues, failing to confine itself to merely demanding

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[24] See, e.g., Fairmont Foods Co., 196 N.L.R.B. 849, 80 L.R.R.M. 1172 (1972).

[25] See Comment, 1972-1973 Annual Survey of Labor Relations Law, 14 B.C. Ind. & Com. L. Rev. 1173, 1202-05 (1973).

[26] I.C. Refrigeration Service, 200 N.L.R.B. No. 107, 81 L.R.R.M. 1529, 1532 (1972).

[27] 205 N.L.R.B. No. 95, 84 L.R.R.M. 1108 (1973).

[28] 471 F.2d 1170, 82 L.R.R.M. 2017 (8th Cir. 1972).

[29] Id. at 1171, 82 L.R.R.M. at 2017-18.

Fairmont's signature of the contract.[30] The court held that the union had acquiesced in Fairmont's withdrawal because of the union's willingness to contract with the remaining members of the multi-employer unit before protesting Fairmont's otherwise untimely and unlawful withdrawal.[31] The court reasoned that it was inequitable to allow the union to circumvent the bargaining impasse resulting from the multi-employer bargaining structure by contracting with the remaining members of that unit; and then penalize Fairmont for withdrawing—an act which broke the impasse and permitted the making of an agreement which the union had been seeking.[32]

In *Associated Shower Door,* the Board refused to follow the broadening of the definition of union acquiescence that was evidenced in the *Fairmont Foods* decision. In *Associated Shower Door,* the union concededly consented to the withdrawal of three employers from the multi-employer bargaining unit when, following an impasse, the union bargained with and signed individual contracts with each of the three employers. Associated, one of the remaining members of the multi-employer unit, then informed both the union and multi-employer association of its own withdrawal from the negotiations, but the union refused to agree to that withdrawal.[33] When the union finally reached agreement with the multi-employer association, and Associated refused to sign, a section 8(a)(5) refusal to bargain charge was filed against Associated.

The Board panel held that although the union had consented to the withdrawal of the three employers with whom it had signed individual contracts, such conduct did not imply a union acquiescence to the total breakup of the multi-employer unit so as to justify Associated's withdrawal and refusal to sign the contract.[34] In a separate opinion Chairman Miller argued that even though the union expressly refused to consent to Associated's withdrawal, the union's separate bargaining with the other employers "so effectively decimated the multiemployer unit that the Union should not thereafter be heard to complain that the original multiemployer unit was no longer viable."[35] Although Chairman Miller's contention was mere dicta, because the entire Board panel agreed that Associated had later reentered the multi-employer unit and thus consented to be bound by the contract, his dicta does appear to be a logical

[30] Id. at 1174, 82 L.R.R.M. at 2019-20.
[31] Id. at 1173, 82 L.R.R.M. at 2019-20.
[32] Id. at 1174, 82 L.R.R.M. at 2020.
[33] 84 L.R.R.M. at 1109.
[34] Id.
[35] Id. at 1110 (concurring opinion).

definition of union acquiescence. Here, the union engaged in conduct which would foreseeably destroy the unity among the member-employers. Those employers which had not yet withdrawn, like Associated, would be without the bargaining power they had been relying upon at the time they voluntarily joined the multi-employer unit. Although the union did not specifically consent to the entire breakup of that unit, it engaged in conduct which destroyed the reason for its formation—group bargaining with the union. It is submitted that when confronted with a case that turns on the resolution of this issue, the Board should identify the union conduct as acquiescence in the breakup of the bargaining unit, and adopt the reasoning of Chairman Miller's opinion. In this way, the Board could prevent the union from engaging in conduct which is tantamount to acquiescence to a withdrawal from the multi-employer bargaining structure, and could further encourage the use of multi-employer bargaining by assuring the continuity of that structure until the parties agree to abandon it.

2. *Surface Bargaining:* U.S. Gypsum

Sections 8(a)(5)[36] and 8(d)[37] of the NLRA impose upon the employer the duty to bargain in good faith with the representatives of the employees, but section 8(d) states that the duty to bargain contains no requirement that the parties agree to any or all substantive contract proposals.[38] The decision as to whether the employer is actually conducting the bargaining "in good faith," with a real intent and desire to reach agreement, necessarily requires a Board inquiry into the state of mind of the employer, as inferred from the surrounding facts and circumstances.[39] The present conflict in this area of "surface bargaining," that is, bargaining without a sincere intent or desire to reach agreement, is over the scope of the evidence which is admissible for purposes of Board resolution of an 8(a)(5) surface bargaining complaint. In a Survey year decision, *Wal-Lite*

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[36] 29 U.S.C. § 158(a)(5) (1970).

[37] 29 U.S.C. § 158(d) provides in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, *but such obligation does not compel either party to agree to a proposal or require the making of a concession*. . . . [Emphasis added.]

[38] See H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

[39] See NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134, 32 L.R.R.M. 2225, 2227 (1st Cir.), cert. denied, 346 U.S. 887 (1953).

Division of United States Gypsum Co. v. NLRB (U.S. Gypsum),[40] the Eighth Circuit refused to enforce a Board order[41] finding a surface bargaining violation by the employer. The Board had received evidence of employer anti-union statements made seven months prior to commencement of bargaining, evidence of the intransigence of the employer's bargaining position as reflected in the similarity of his initial and final contract proposals, and evidence of the limited negotiating authority granted to the employer's chief negotiator.[42] Although the Board noted that each of the factors alone would not support an inference of bad faith bargaining, it did hold that "the totality of the bargaining conduct itself establishes that Respondent's state of mind throughout the negotiations was one of unwillingness to reach agreement except, perhaps, exclusively upon its own terms."[43]

Underlying the bargaining impasse had been the parties' conflict over whether to use the current contract, negotiated and signed by Gypsum's predecessor, and assumed by Gypsum only for the contract's duration, as the starting point for negotiations for a new contract. Although the Board majority had not cited the employer's failure to accept this starting point as evidence of surface bargaining, Chairman Miller's dissent claimed that such employer conduct was the basis of the majority's decision.[44] He felt compelled to dissent, indicating that such an evidentiary basis for the decision violated the section 8(d) prohibition against the Board requiring parties to make certain proposals or concessions.[45]

The Eighth Circuit, in its Survey year decision, agreed with Chairman Miller and denied enforcement of the Board's order, which it saw as primarily derived from the evidence of the employer's refusal to accept the predecessor employer's contract as the base for bargaining.[46] The court had dismissed all other evidence as irrelevant to the issue of the employer's good faith in bargaining and thus felt the case turned on that evidence.[47] The court then reasoned that the effect of using such evidence to find a section 8(a)(5) violation against the employer would be to force the employer to make certain proposals, a result contrary to the purpose

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[40] 484 F.2d 108, 84 L.R.R.M. 2129 (8th Cir. 1973).

[41] 200 N.L.R.B. No. 132, 82 L.R.R.M. 1064 (1972). For a discussion of this Board decision, see Comment, 1972-1973 Annual Survey of Labor Relations Law, 14 B.C. Ind. & Com. L. Rev. 1173, 1197-1202 (1973).

[42] 82 L.R.R.M. at 1065-68.

[43] Id. at 1066.

[44] Id. at 1069.

[45] Id.

[46] 84 L.R.R.M. at 2130.

[47] Id.

of section 8(d). If consideration is to be given to the NLRA statutory scheme of providing the mechanism for meaningful negotiations but prohibiting government regulation of the substance of those negotiations,[48] the Eighth Circuit's refusal to allow the Board to find a violation of section 8(a)(5) by relying on evidence of substantive contract proposals would appear warranted.

However, it is submitted that the *U.S. Gypsum* court failed to confront the real issue in the area of surface bargaining—whether the Board may use evidence of the employer's *intransigence* in bargaining over substantive contract proposals as evidence of both lack of intent to reach agreeable terms and refusal to bargain in a spirit of give and take. If this is the type of evidence which the Board decision in *U.S. Gypsum* actually relied upon, it is at least arguable that the Board was not inquiring into the substance of contract proposals, but only viewing those proposals at the different points during the negotiation process as a means of evaluating the employer's willingness to negotiate. In that case, the Board could not be criticized, as it was by the Eighth Circuit, for evaluating the reasonableness of the employer's contract proposals in its surface bargaining inquiry.

3. *Successor Employer*

a. *Duty to Remedy Predecessor's Unfair Labor Practices*—In *Golden State Bottling Co. v. NLRB*,[49] a Survey year decision, the Supreme Court has given its imprimatur to the Board rule that successor employers, having purchased the business with knowledge that the predecessor employer committed an unfair labor practice, are obligated to remedy the unfair labor practice. The unanimous decision of the Court is notable not only for its broad interpretation of the Board's remedial powers as authorized under section 10(c) of the NLRA,[50] but also because it constituted the first analysis given by the Court to the successorship doctrine since its 1972-73 Survey year opinion in *NLRB v. Burns International Security Services, Inc.*[51]

[48] See *H.K. Porter*, 397 U.S. at 105-06.

[49] 414 U.S. 168 (1973).

[50] 29 U.S.C. § 160(c) provides in pertinent part:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him . . . .

[51] 406 U.S. 272 (1972).

In *Golden State,* the predecessor employer had unlawfully discharged an employee, and the Board, having found violations of sections 8(a)(1) and 8(a)(3), ordered both Golden State and its successors to reinstate the discharged employee with back pay. The Board found that All-American, as a successor employer, had purchased the operation with knowledge of this outstanding Board order against the predecessor.[52]

The Board's rule, as enforced against a successor who had committed no unfair labor practice, had been announced in *Perma Vinyl Corp.*[53] The Board there reasoned that equitable principles justified imposing liability on a successor who purchased the operation with knowledge of his predecessor's unfair labor practice, since, although the successor had no causal connection with the unlawful conduct, it is in the best position to assure employees their statutory rights and thus promote industrial peace.[54] It was noted in *Perma Vinyl* that any economic burden thus imposed upon the successor could be recovered from the predecessor by including an indemnity clause in the sales contract or by reflecting that burden in the purchase price.[55] More importantly, the Board there saw the rule as rooted in the concept of successorship:

> Thus, "it is the employing industry that is sought to be regulated and brought within the corrective and remedial provisions of the Act in the interest of industrial peace." When a new employer is substituted in the employing industry there has been no real change in the employing industry insofar as the victims of past unfair labor practices are concerned, or the need for remedying those unfair labor practices. Appropriate steps must still be taken if the effects of the unfair labor practice are to be erased and all employees reassured of their statutory rights.[56]

The Court in *Golden State* seized upon this reasoning in finding that both a sound statutory interpretation and proper labor policies weighed in favor of the Board rule. Since there was complete continuity in the operation of the business, despite the change in ownership, the Court noted that employees would reasonably expect their "job situations" to remain essentially the same. In such circumstances, the successor's failure to remedy the violation would appear

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[52] 414 U.S. at 170-73.

[53] 164 N.L.R.B. 968, 65 L.R.R.M. 1168 (1967), enforced sub nom., United States Pipe & Foundry Co. v. NLRB, 398 F.2d 544, 68 L.R.R.M. 913 (5th Cir. 1968).

[54] 164 N.L.R.B. at 969, 65 L.R.R.M. at 1168-69.

[55] Id.

[56] Id.

to the employees to be a continuation of the predecessor's unlawful conduct, thus encouraging industrial strife.[57] The Court noted that although the *Burns* Court had held that continuity in the "job situations" of the employees did not justify imposition of the predecessor's collective bargaining agreement upon the successor, in this case there was no statutory policy prohibiting the imposition upon the successor of mere remedial, non-contractual obligations.[58]

Along with these policy considerations, the *Golden State* Court faced the issue of whether the Board's remedy was authorized by section 10(c)[59] of the Act. The Board itself has historically fluctuated between endorsing the narrow view that section 10(c) permits Board imposition of liability only upon the agent of the unlawful conduct, and applying, as it does currently, the view that 10(c) permits Board action against the successor of the agent.[60] The Court accepted the current Board view, reasoning that the section 10(c) language authorizing such Board remedies "as will effectuate the policies of the Act" logically includes the authority to impose liability upon a successor. The Court also ruled[61] that the remedy is not barred by Rule 65(d) of the Federal Rules of Civil Procedure,[62] the language of which states that injunctions and restraining orders shall be "binding only upon the parties to the action, their officers, agents, servants, employees and attorneys, and upon those persons in active participation with them who receive actual notice of the order by personal service or otherwise." Noting that this Rule has traditionally been interpreted as permitting enforcement against those in "privity" with the violator, the Supreme Court held that such "privity" status exists between the successor and the predecessor employer when the successor purchases the operation with knowledge that the violation remains unremedied.[63]

Although an essential factor in the Court's decision was that the successor had knowledge of the outstanding Board order at the time of purchase, the successorship doctrine, which is based upon the policy of promoting continuity for the employees who remain in essentially the same operation under a different ownership, was accorded considerable weight. The Court utilized this policy in justifying both the exercise of discretion by the Board and the statutory interpretations of section 10(c) and Rule 65(b) made by the

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[57] 414 U.S. at 184-85.
[58] Id. at 184.
[59] 29 U.S.C. § 160(c) (1970).
[60] 414 U.S. at 174-75 (citing cases).
[61] Id. at 177-78.
[62] Fed. R. Civ. P. 65(d).
[63] 414 U.S. at 179.

Board.[64] The Court's approval of the policy of continuity and fulfillment of employee expectations, which is the backbone of the successorship doctrine, is extremely significant. In 1972 the Court's *Burns* decision had cast doubt upon the viability of the policy underlying that doctrine, at least as applied in the area of contract survival. In light of the small burden imposed upon the successor who can recoup his losses against the predecessor,[65] and the Court-approved rule of joint and several liability between both employers for all back pay accrued until the date of reinstatement, the Court's decision seems both legally and functionally sound.

b. *Contract Survival*—In its 1972-1973 Survey year decision, *NLRB v. Burns International Security Services, Inc.*[66] the Supreme Court decided three issues: (1) whether a "successor" employer assumes the obligations of the existing collective bargaining agreement by operation of law;[67] (2) whether a "successor" has a duty to bargain with the representative of the predecessor's employees;[68] and (3) when the bargaining obligation of the "successor" commences so as to terminate his right to set unilaterally the terms and conditions of employment.[69]

In the areas of contract survival and duty to bargain, the Court expressed dicta which created some doubt as to the scope of the Court's disapproval of Board policy and which left uncertain the future course the Board was directed to take. In the area of contract survival, the *Burns* Court had ruled that the section 8(d)[70] statutory prohibition against Board imposition of substantive contract terms upon parties, and the policy favoring encouragement of free transfer of capital, left the Board without authority to require that the successor assume the predecessor's obligations under the current collective bargaining agreement.[71] However, the *Burns* Court noted that, on the facts of the case at bar, the successor had explicitly disavowed assumption of those contractual obligations,[72] and also pointed out that "in a variety of circumstances involving a merger, stock acquisition, reorganization, or assets purchase, the Board might properly find as a matter of fact that the successor had

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[64] Id. at 181-85.

[65] Id. at 185.

[66] 406 U.S. 272 (1972). For an analysis, see Comment, 1972-1973 Annual Survey of Labor Relations Law, 14 B.C. Ind. & Com. L. Rev. 1173, 1209-16 (1973).

[67] 406 U.S. at 291.

[68] Id. at 278-79.

[69] Id. at 294-95.

[70] 29 U.S.C. § 158(d) (1970).

[71] 406 U.S. at 281-84, 288.

[72] Id. at 286.

assumed the obligations under the old contract."[73] Although the Court did not discuss whether the absence of such an explicit contract disavowal or the presence of one of those circumstances would justify a Board inference of assumption of contract obligations, that language and the narrow fact situation upon which the Court concededly based its holding[74] left some doubt as to the issue of contract survival in the law of successorship.

However, Survey year Board decisions have not implemented the Court's dicta in *Burns* by finding contract survival by the successor under the "variety of circumstances" outlined in *Burns*. In *All State Factors,*[75] a commercial finance company assumed operation of a meat packing company, retaining the same management and procedures. The financial reorganization did not alter the company's method of operations. The Board panel did not find contract survival, although the facts fell within the scope of the *Burns* dicta. In a second Survey year Board decision, *Ecklund's Sweden House Inn, Inc.*,[76] the Board did hold that a successor must execute the entire set of employer obligations under the current contract with the union, but justified that holding on peculiar facts. There, the successor had purchased the physical plant, executing a sales contract with the predecessor in which the successor stated explicitly its refusal to assume the union-predecessor contract. Nevertheless, soon after the transfer, the successor's management assured the union that there would be no changes and noted that it had checked off union dues for that month pursuant to the contract.[77] Several months later the successor rejected the union's demand for adherence to the contract. The opinion of the Administrative Law Judge,[78] adopted by the Board panel, noted that under *Burns,* the specific disavowal of the collective bargaining agreement as expressed in the sales contract would normally prohibit contract survival. However, the opinion reasoned that where the successor had made assurances of continuity to the union, temporarily enforced the check off provision, and granted wage increases under the contractual guidelines, the employer

> cancel[led] any intent to the contrary which the respondent may have previously or subsequently manifested not to be bound by the collective agreement; and most certainly it abrogates its agreement with the seller . . . not to assume

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[73] Id. at 291.
[74] Id. at 274.
[75] 205 N.L.R.B. No. 131, 84 L.R.R.M. 1252 (1973).
[76] 203 N.L.R.B. No. 56, 83 L.R.R.M. 1173 (1973).
[77] 83 L.R.R.M. at 1174.
[78] Id.

> the contract . . . Under such circumstances, therefore, nothing in the *Burns* decision would negate the Respondent's obligation under the contract between it and the union . . . .[79]

These Survey year decisions appear to indicate that the Board is not interested in testing the effect of the *Burns* dicta regarding contract survival and that it will not mechanically infer such survival merely from a reorganization or assets purchase by the successor employer.

c. *Successor's Bargaining Obligations*—Another successorship issue left unclarified by *Burns* was the date of the maturation of the bargaining duty of the successor. The Board's decision in *Burns* had found that Burns, the successor, violated the section 8(a)(5) duty to bargain by unilaterally altering the conditions of employment specified by the predecessor's bargaining agreement at the time the predecessor's employees were hired by Burns.[80] In reversing this decision, the Supreme Court held that the successor's duty to bargain does not mature until after the successor had hired enough of the predecessor's employees to indicate that the union retains majority status under the new employer's business operation.[81] However, the Court in *Burns* qualified the approval thus granted to the unilateral alteration of the existing conditions of employment made by Burns at the time the predecessor's employees were hired:

> Although a successor employer is ordinarily free to set initial terms on which it will hire the employees of a predecessor, there will be instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees before he fixes the terms.[82]

Perhaps because such facts were not before the *Burns* Court, it did not explain whether the *duty to consult* would encompass the full statutory duty of the employer to bargain with the union to impasse before unilaterally changing the conditions of employment specified in the predecessor's contract.[83] It remained for the Board to define the scope of the "duty to consult" and to decide which factual circumstances would indicate when the successor employer "plans to retain all of the employees in the unit" so as to acquire the duty to consult with the union.

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[79] Id.
[80] 406 U.S. at 293-94.
[81] Id. at 294-95.
[82] Id.
[83] See NLRB v. Katz, 369 U.S. 736 (1962).

In two Survey year decisions, the Board has indicated that it interprets the *Burns* "duty to consult" language as mandating the full statutory duty to bargain for successor employers who wish to alter the conditions of employment specified under the predecessor's contract with the union. In *Bachrodt Chevrolet Co.*,[84] a Survey year decision, the Board found that the successor employer, upon purchase of the business, hired the entire complement of the predecessor's bargaining unit employees. The hiring had occurred at interviews conducted on the date of transfer of ownership. At the interviews, the successor employer did not condition continued employment upon acceptance of conditions of employment different from those specified under the predecessor's contract with the union. The Board concluded that on the date of hiring it was clear that the union would retain its majority status in the bargaining unit subsequently operated by the successor. It consequently held that the successor violated the section 8(a)(5) duty to bargain when, one week later, he unilaterally lowered the current wages without bargaining with the union.[85] The Board reasoned that under *Burns*, the employer had had his chance to unilaterally change the existing conditions of employment at the interviews, at which time it was not yet clear that the entire group of employees would be retained so as to continue the union majority. Once the hiring had occurred, the Board pointed out, the employer knew that the union had a majority in the bargaining unit, and at that time his duty to bargain attached.[86] The Board implied that, in order to conform with *Burns*, the successor's alternative was to condition the hiring of the old employees upon their acceptance of employment terms different from those in the predecessor's contract with the union. In that case, it would not be true that the successor plans to retain the entire bargaining unit, and thus has not incurred the duty to consult with the unit's union representative before the making of unilateral changes.[87]

In *Denham Co.*,[88] the second Survey year Board decision dealing with the successor's duty to consult, the successor did announce unilateral reductions in wages on the date of transfer of ownership of the business. Although the successor did not formally hire the old employees, the Board found that it was clear that the successor planned to retain the entire unit on that date, especially since the contract of sale of the business obligated the successor to retain the

[84] 205 N.L.R.B. No. 122, 84 L.R.R.M. 1052 (1973).
[85] 84 L.R.R.M. at 1054.
[86] Id.
[87] Id.
[88] 206 N.L.R.B. No. 75, 84 L.R.R.M. 1359 (1973).

bargaining unit employees for a definite period of time. The Board held that because the successor had planned to retain the entire bargaining unit on the date of transfer of ownership, the successor's obligation to bargain with the union representative before making unilateral changes had already matured on that date.[89] In this case, the Board indicated that where the successor has otherwise demonstrated clearly that he plans to retain the entire bargaining unit, a mere announcement of changes in the conditions of employment prevailing under the predecessor's union contract, without specifically conditioning employment upon acceptance of those changes, will not allow the successor to escape the duty to bargain with the union before making such changes.

The result of the Board's application of *Burns* in these two cases is grounded upon sound law and practical economics. Once the successor has retained substantially all of the predecessor's employees, without expressing the intention to do so only if they agree to accept conditions of employment different from those specified in the existing labor contract, the employer knows that the union majority has been carried over into his new operation. It is well established that where there is such clear evidence of majority status,[90] the employer acquires the duty to bargain with the union. Survey year Board decisions have indicated that in the successorship situation, retention of a bargaining unit represented by a union is such strong evidence of continued majority status that a presumption of such status arises solely because of the retention of the unit.[91]

Since the employer must bargain to impasse before making unilateral changes in existing employment conditions, the result may be a temporary imposition of the predecessor's contract terms upon the successor. This result would not entirely conform with the *Burns* decision,[92] but that imposition lasts only until the successor fulfills the duty to consult with the union, a duty interpreted by the Board in these cases as the statutory duty to bargain. Furthermore, the Board indicates that a successor can escape even temporary contract imposition by first fixing initial conditions of employment for the unit employees, and then conditioning his hiring of such unit employees upon their acceptance of those conditions.

d. *Defining Successorship*—A major cause of challenges to the persuasiveness of the *Burns* decision is the controversy over whether the "successor," Burns, was actually a successor employer. The

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[89] 84 L.R.R.M. at 1360.

[90] See NLRB v. Katz, 369 U.S. 736 (1962).

[91] B & W Maintenance Serv., 203 N.L.R.B. No. 101, 83 L.R.R.M. 1163 (1973); D & F Super Market, 208 N.L.R.B. No. 119, 85 L.R.R.M. 1193 (1974).

[92] 406 U.S. at 286-88.

dissenting opinion of Justice Rehnquist, with which three other Justices concurred, argued that Burns did not fit within the proper definition of a successor.[93] Justice Rehnquist reasoned that although the policy behind the imposition of bargaining duties upon a successor is to assure a measure of continuity in the industrial relations within the employing operation, such a policy "may more accurately be described as a statement of the result of a finding of successorship, rather than a reason for making that finding."[94] Justice Rehnquist explained that the reason for finding successorship has traditionally been that the employing operation continued to be substantially the same despite the transfer in legal ownership, and for that reason the employees were justified in holding expectations of some continuity in their labor relations with the employing operation.[95] The dissent viewed a sale of the tangible and intangible assets as significant evidence of substantial continuity in the employing operation. However, the dissenters thought that the factual situation of *Burns,* involving a mere transfer of a group of employees between two employers competing for the same contract to perform security work, without more, precluded a finding of the substantial continuity in the employing operation that is necessary to a finding of successorship.[96]

In *Burns,* Justice Rehnquist concluded that the appropriate bargaining unit of employees in the predecessor's organization ceased to be appropriate for Burns, a much larger and complex organization. He contended that therefore it was not proper to require Burns to bargain with the representative of that unit.[97] The dissenters were unwilling, unlike the Board, to presume continued unit appropriateness because Burns was a "successor," reasoning that continuity of unit appropriateness is a prerequisite to the fact of successorship, not a presumed result of that fact.[98] Because Burns' duty to bargan with the union with which the predecessor had dealt attached only if the union continued to have majority status in Burns' bargaining unit, the dissent argued against imposing bargaining duties upon Burns unless there was a preliminary factual finding of continued appropriateness of the unit. The major evidence concerning the issue of unit appropriateness utilized by the Board was a presumption that, because Burns was a "successor," the old unit must continue to be appropriate under the business organization of

[93] Id. at 296 (dissenting opinion).
[94] Id. at 300 (dissenting opinion).
[95] Id. at 300-02 (dissenting opinion).
[96] Id. at 305-06 (dissenting opinion).
[97] Id. at 298-99.
[98] Id.

the new employer.[99] Justice Rehnquist argued that a finding of continued appropriateness of the unit should be a prerequisite to a finding of successorship because whether there is continued appropriateness of the bargaining unit largely determines whether there is substantial continuity in the employing operation,[100] which underlies the justification for defining the new employer as a successor.

A Survey year Board decision indicates that a majority of Board members have been persuaded to adopt Justice Rehnquist's reasoning and predicate the finding of successorship, which carries the duty to bargain with the representative of that unit, upon the preliminary finding of continued appropriateness of the old bargaining unit within the operation of the new employer. In *Border Steel Rolling Mills, Inc.*,[101] the new employer purchased the machinery assets of the predecessor, who had done business within the same plant as that used by the new employer. The predecessor's business had been the performance of maintenance work for the new employer. After purchasing the machinery assets of the predecessor, the new employer took over the maintenance operations previously performed by the predecessor, and retained twelve of the predecessor's fourteen employees. The twelve employees continued to perform the same work in the same shop. However, the new employer refused to bargain with the union which had represented the fourteen member unit under the prior employer. Instead, the new employer applied the terms of an existing collective bargaining agreement between himself and another union to the twelve employees. This agreement covered his already existing plant-wide unit. The Administrative Law Judge conducted an inquiry into the continued appropriateness of the twelve member unit, and, finding that the twelve employees' work had become integrated with that of employees in the plant-wide unit, and that the twelve had no special community of interest, concluded that the old unit would not be appropriate within the operation of the new employer. Because of this fact, the Board concluded he was not a successor employer to those twelve employees, and thus had no duty to bargain with their previous bargaining representative.[102]

The opinion of the Administrative Law Judge, adopted by a majority of the Board panel, specifically rejected the contention of the General Counsel that the employer was a successor and that, as a result, the bargaining unit should be conclusively presumed ap-

[99] Id. at 275.
[100] Id. at 297-99 (dissenting opinion).
[101] 204 N.L.R.B. No. 89, 83 L.R.R.M. 1606 (1973).
[102] 83 L.R.R.M. at 1608-09.
[103] Id.

propriate and kept intact.[103] The *Border Steel* decision appears to alter the Board's definition of successorship, as expressed in the *Burns* case. This alteration is accomplished by making the finding of successorship turn upon the continuity of the unit appropriateness within the new employer's operation, rather than presuming continued unit appropriateness from a finding of successorship that was made without a prior inquiry in the appropriateness of the old bargaining unit in the new employer's operation. In *Burns,* as in *Border Steel,* the new employer already had a bargaining relationship with a company-wide unit.[104] Unlike *Border Steel,* the Board in *Burns* had presumed the small, transferred unit to be appropriate for the new employer's operation without an inquiry into its actual appropriateness.

In *Border Steel,* the Board has properly changed its definition of successorship. Successorship may be defined as a situation where, despite the change of employers, there remains substantial continuity in the employing environment for the employees. Thus, it is logical to predicate the finding of successorship upon a factual finding of continued unit appropriateness—a finding which is essential to a finding of substantial continuity in the employing environment. Since all the relevant factors that constitute the employing environment are considered in an inquiry into the appropriateness of a bargaining unit, continuity in the appropriateness of the unit will be evidence of continuity in the employing environment, and thus justify a finding of successorship. Although Member Penello dissented in the *Border Steel* decision, his expressed opposition to this change does not appear persuasive in the light of his demonstrated willingness to evaluate the continued appropriateness of the transferred unit.[105]

It is submitted that the use of a separate inquiry into the continued appropriateness of the transferred unit as a means of deciding the issue of successorship is proper. The justification for imposing bargaining duties upon an employer found to be a successor is the need to fulfill the reasonable expectation of the transferred employees for continuity in their employment relationship where the employing entity has remained substantially the same. Such a separate inquiry aids in determining whether the employing environment has remained substantially the same. The appropriateness of the transferred unit within the new employer's total operation is an important tool in deciding whether there is substantial continuity between the old and the new employing entities. The very same

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[104] 406 U.S. at 298 (dissenting opinion).
[105] 83 L.R.R.M. at 1609-11.

factors that determine the appropriateness of a bargaining unit—the nature and integration of the employees' duties, the type of work the employer performs, and the community of interest among the group of employees—also serve as factors in determining whether there is substantial continuity in the nature of the employing entity and the employees' employment environment.

D. *Secondary Boycotts**

1. *Right to Control Test:* George Koch

The NLRA prohibits secondary boycotts. In a Survey year decision by the Fourth Circuit, *George Koch Sons, Inc. v. NLRB,*[1] the Board has finally convinced a circuit court of appeals to approve its use of the "right to control" test in the area of secondary boycotts. Until *George Koch,* the courts of appeals had followed a rule derived from *National Woodwork Manufacturers Association v. NLRB,*[2] where the Supreme Court held that union coercion of an otherwise neutral employer aimed at preservation of work traditionally performed by the union, does not constitute a secondary boycott. In contrast, under the right to control test, the Board determines whether or not a refusal to work, or other union pressure directed against an employer, is lawful "work preservation" activity[3] outside the ban of the Act's secondary boycott provisions[4]

* The authors wish to acknowledge the helpful research and comments on the cases discussed in this section provided by Allan Carlin of the Boston College Industrial and Commercial Law Review.

[1] 490 F.2d 323, 84 L.R.R.M. 2957 (4th Cir. 1973).

[2] 386 U.S. 612 (1967).

[3] See National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 644 (1967). In this landmark Supreme Court decision, it was held that where the union pressure is directed against the employees' employer in order to preserve work for those employees, there is no secondary boycott. Id. at 644-45. The Court reasoned that although the employer may arguably be considered neutral to the union's grievance because it is another employer who is performing the work the union seeks to preserve, the employer is actually the person in dispute with the union. Thus, the union's pressure against him is primary, rather than secondary, in nature.

[4] Section 8(e) of the Act, 29 U.S.C. § 158(e) (1970), prohibits the execution of contractual agreements whereby the union and the employer agree that the employer will boycott the use of another person's products or will cease doing business with a "secondary" person. 29 U.S.C. § 158(e) (1970), the "hot cargo" provision, states in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such agreement shall be to such extent unenforceable and void . . . .

Section 8(b)(4), 29 U.S.C. § 158(b)(4) (1970), on the other hand, prohibits a union from striking or engaging in other pressure to force the employer to boycott the products of, or cease doing business with, a third person. 29 U.S.C. § 158(b)(4) states:

by means of a test which places significant weight upon whether the pressured employer has legal control over the work the union seeks to preserve.[5] The Board's right to control test may thus result in a finding of a secondary boycott even where the union pressure is aimed at work preservation. As the Board has conceded,[6] the use of this test to determine whether the union has engaged in secondary boycotts, until *George Koch,* has been unanimously rejected by the courts of appeal.[7] Thus, the Fourth Circuit's Survey year decision constitutes an important case for the Board, and if followed by other circuits or the Supreme Court, the case may greatly expand the area of prohibited secondary boycotts, and thus may eliminate some of the union's economic weapons.

A discussion of the right to control test requires a preliminary inquiry into the Supreme Court's landmark 1967 decision, *National Woodwork Manufacturers Association v. NLRB (Woodworkers).*[8] That decision is significant because it induced the courts of appeals to reject the Board's right to control test. Before *Woodworkers* those courts had expressed approval of that test.[9] In *Woodworkers,* the Court interpreted the secondary boycott prohibitions of the Act.[10] There, the union represented carpenters working for the general contractor. The general contractor-employer ordered the carpenters to hang doors which were prefitted, although the collective bargaining agreement between the union and the employer provided that the carpenters would not install prefitted doors; that contract guaranteed that the work of cutting and fitting the blank doors would be allocated to the union's jobsite carpenters. Under literal readings of section 8(e) and section 8(b)(4)(B), the contractual provi-

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It shall be an unfair labor practice for a labor organization or its agents— . . .

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise, handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce or restrain any person engaged in commerce, or in an industry affecting commerce where in either case an object thereof is— . . .

(B) forcing or requiring any person to cease using, selling, handling, transporting or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . .

[5] The "right to control" test was determinative in the Board's decision in George Koch Sons, Inc., 201 N.L.R.B. No. 7, 82 L.R.R.M. 1113 (1973).

[6] See 82 L.R.R.M. at 1116.

[7] E.g., Local 742, Carpenters v. NLRB, 444 F.2d 895, 76 L.R.R.M. 2979 (D.C. Cir.), cert. denied, 404 U.S. 986 (1971); American Boiler Mfrs. Ass'n v. NLRB, 404 F.2d 556, 69 L.R.R.M. 2858 (8th Cir. 1968); NLRB v. Local 164, IBEW, 388 F.2d 105, 67 L.R.R.M. 2352 (3d Cir. 1968); Western Concrete Prods. Inc. v. NLRB, 77 L.R.R.M. 3023 (9th Cir. 1971).

[8] 386 U.S. 612 (1967).

[9] See cases cited in 201 N.L.R.B. No. 7, 82 L.R.R.M. 1113, 1116 n.17 (1973).

[10] 29 U.S.C. §§ 158(b)(4)(B), 158(e) (1970).

sion and the work stoppage to enforce it would have been, respectively, an unlawful contract to execute a secondary boycott (hot cargo provision) and an unlawful secondary boycott.[11] The contractual provision and the refusal to install, in a literal sense, constituted coercion upon the employer to require him to cease or refrain from handling the products of another employer,[12] and thus arguably was prohibited by the Act.

However, the Supreme Court in *Woodworkers* pointed out that conduct apparently prohibited because it falls within the letter of the statute, may nevertheless be permissible because it is not within the area of prohibition actually intended by the legislative framers.[13] The Court concluded that the legislative history of the secondary boycott provisions of the Act indicated that the intent was to prohibit union conduct and contract provisions aimed at pressuring another person into acceding to the union's wishes by forcing an employer, otherwise neutral to the union's complaint, to cease doing business with the other person.[14] The prohibition of conscription of the neutral employer was the intended purpose of the Act's secondary boycott provisions;[15] such conscription was bad even if the neutral employer happened to be the employer of the employees engaging in the refusal to work.

However, upon an examination of the facts, the Court in *Woodworkers* concluded that the aim of the union was preservation of work for the employees working for the general contractor-employer.[16] The Court thus refused to define the employer as neutral to the dispute.[17] Since the aim of the union was the preservation of work for the employees at the employer's jobsite, the union was not conscripting a secondary, neutral employer; rather, because its goal was the preservation of work for the jobsite carpenters, the union's purpose was to pressure the employer to force him to accede to their work preservation goals.[18]

Although not discussed, an apparently important fact in *Woodworkers* was that the employer was not bound by any contract obligations, either to the owner of the site or to a product supplier, to install only prefitted doors.[19] Being free to purchase prefitted doors or purchase blank doors to be cut and fitted by his jobsite

[11] See 386 U.S. at 619.
[12] 29 U.S.C. § 158(b)(4)(B) (1970).
[13] See 386 U.S. at 619.
[14] Id. at 624-33.
[15] Id. at 624-25.
[16] Id. at 635-42, 645-46.
[17] See id. at 644-45.
[18] Id. at 646.
[19] Id. at 616.

carpenters, the employer had the ability to fulfill his employees work preservation goals by purchasing doors to be fitted by them at the jobsite. Thus, the pressured employer had the right to control the work desired by the union. Prior to *Woodworkers,* the Board had found union pressure against an employer to be an unlawful secondary boycott if the employer, unlike the employer in *Woodworkers,* did not have the legal right to give the work to his employees. This lack of control may be the result of contract specifications dictated by either the owner of the construction site or by the general contractor.[20] *Woodworkers* created a work preservation exception to the prohibition of secondary boycott. Nevertheless, the Board continued to apply the right to control test after *Woodworkers,* maintaining that the holding of *Woodworkers* did not forbid it to limit the exception created by *Woodworkers.*[21] This view was justified on the grounds that the *Woodworkers* holding was confined to the fact situation in which the employer did have the legal right to control the disputed work. Thus, since the Court had not needed to decide the validity of the right to control test, the Board felt *Woodworkers* did not control the situation where the employer did not have the right to control the work.[22] The Court in *Woodworkers* had specifically refused to decide whether an employer's lack of legal right to control the work would make the employer neutral to the dispute and thus convert otherwise lawful work preservation action into unlawful secondary activity.[23]

In its *George Koch* decision, the Board, in its continuing effort to convince the courts of appeals that such factual dissimilarities distinguished *Woodworkers,* reasoned that a union engaging in a boycott to enforce work preservation agreements is not entitled to the *Woodworkers* immunity from a finding of a section 8(b)(4)(B) violation if it directs its boycott at an employer who is legally incapable of allocating the work to the union. In *George Koch,* the union represented employees of the subcontractor, Phillips, who had contracted with the general contractor, Koch, to install pipe at the plant of General Electric.[24] Specifications in the contract executed by General Electric and Koch required that all pipe be prefitted by the original pipe manufacturer rather than by Phillips' employees at the jobsite. Phillips' employees, citing the fact that their collective bargaining agreement required that all fitting work on pipes to be installed by Phillips be accomplished by jobsite employees,[25] refused

[20] See 201 N.L.R.B. No. 7, 82 L.R.R.M. at 1116-17 n.17 (citing cases).
[21] 82 L.R.R.M. at 1118-19.
[22] Id. at 1115-16.
[23] 386 U.S. at 616-17 n.3.
[24] 82 L.R.R.M. at 1114-15.
[25] Id.

to install the prefitted pipe. Thus, rather than boycotting the prefitted pipes, the union could have rightfully sued Phillips for a breach of contract.[26] The Board held that the union was prohibited from boycotting Phillips and Koch, because they were neutral to the union's demands since they were legally incapable of giving Phillips' employees the pipe fitting work because of specifications dictated by the owner, General Electric.[27]

The Board followed a three-step reasoning process in reaching this conclusion. First, both employers, Phillips and Koch, were found to be neutral to the union's complaint. Since the union knew that their work preservation objectives could be achieved only by General Electric's agreement to alter the job specifications of its general contract with Koch, the Board concluded that the union's refusal to install the prefitted pipes must have been aimed at affecting General Electric,[28] thus demonstrating that the pressured employers, Koch and Phillips, were indeed neutral to the union's aims and hence deserving of protection from this activity.[29] Second, the Board reasoned that because the challenged union conduct here can be reasonably viewed as aimed at producing effects upon someone other than Phillips and Koch, *Woodworkers* did not require validation merely because the aim of the conduct was to preserve work for the employees.[30] The Board noted that the *Woodworkers* test of secondary boycotts was whether, "under all the surrounding circumstances, the Union's objectives was preservation of work for . . . employees [of the pressured employer], or whether the agreements and boycotts were tactically calculated to satisfy union objectives elsewhere."[31] Applying that test, the Board found that the union's boycott of Koch and Phillips was secondary rather than primary activity because it must have been aimed at affecting the conduct of someone other than the pressured employers, Koch and Phillips.[32]

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[26] 29 U.S.C. § 185 (1970) confers jurisdiction over suits for breaches of collective bargaining agreements upon the federal district courts, regardless of citizenship of the parties or the amount in controversy. Thus, so long as the collective bargaining agreement specifying the prefitting work to be allocated to Phillips' jobsite work was work preservation in nature and not violative of § 8(e) hot cargo provisions, the provision could be the valid basis for a suit for breach of contract by the union against Phillips. See *Woodworkers*, 386 U.S. at 643. However, according to the Board, the mere fact that the union is engaging in a boycott of the employer to enforce a valid work preservation agreement with him will not insulate it from a § 8(b)(4)(B) violation if the employer, with respect to the particular subcontract under which he is working, does not have the right to control who is to perform the pipefitting. 82 L.R.R.M. at 1117.

[27] 82 L.R.R.M. at 1117.

[28] Id. at 1116.

[29] See id.

[30] Id. at 1117.

[31] 386 U.S. at 644.

[32] 82 L.R.R.M. at 1117-18.

Seeking to convince the courts of appeals to return to pre-*Woodworker* cases upholding the Board's use of the right to control test, the Board argued that its test did not authorize the employer to abdicate his right to control by agreeing to owner's specifications contrary to the collective bargaining agreement he executed with the union.[33] If the pressured employer could have retained that right to control, the Board pointed out, the fact that he did not possess it at the time of the union's objections, may not permit the employer to plead no control in the face of the union's work preservation boycott.[34]

In enforcing the Board's order,[35] the Fourth Circuit agreed that the lack of the right to control of the boycotted employers was persuasive evidence that the union objectives were directed elsewhere than at the employers. The court accepted the Board's statement that it was not using right to control as a per se test of whether the union's boycott was primary or secondary in nature.[36] The court agreed that because Phillips and Koch were unable to allocate the work, they were neutrals. The court conceded, however, that employers should not be accorded the status of a neutral and be entitled to protection from the employees' boycott where, in negotiating work contracts, the employer was in a position to give effect to the work preservation clause in his union contract.[37] The Fourth Circuit felt such a situation was not encompassed within the record presented. According to General Electric's specifications, neither Koch nor the subcontractor ever had any right to control the allocation of the pipe-fitting work;[38] nor was there any evidence that they sought those specifications in order to avoid the work preservation provisions of the collective bargaining agreement with the union.[39]

Although the Fourth Circuit conditioned its approval of the right to control test upon its use as only one of the factors relevant to the Board's inquiry into whether the union's pressure against the employer is secondary, its approval is significant in that the Board's

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[33] Id.

[34] Id.

[35] George Koch Sons, Inc. v. NLRB, 490 F.2d 323, 328, 84 L.R.R.M. 2957, 2961 (4th Cir. 1973).

[36] Id. at 327, 84 L.R.R.M. at 2960. The court stated that:

> Despite the union's opposing contention, the Board has not exalted right-to-control as per se the conclusive indicium of a secondary boycott. On the contrary, the Board obediently followed on the Court's instruction, according weight to all existing and relevant circumstances.

Id.

[37] Id. at 328, 84 L.R.R.M. at 2960.

[38] Id., 84 L.R.R.M. at 2961.

[39] Id.

application of right to control in *George Koch* was of controlling weight. It is submitted that use of the right to control may place restrictions on union conduct not contemplated by either the framers of the statute or by the Supreme Court. The fact that the union is attempting to enforce a valid work preservation agreement executed with the employer indicates that the employer is primary to the union's purposes. Although the union may hope to have the employer put pressure upon the general contractor or owner in order to acquire from them the right to allocate the work to the employees, the union's boycott, using the *Woodworkers* test, is not "tactically calculated to satisfy union objectives elsewhere."[40] The union is still concerned with work preservation and with the labor relations between its employees and the boycotted employer, and thus its objectives do not lie "elsewhere." There may be some merit in the use of the right to control to promote a policy of discouraging strikes and other action against an employer who, at that time, has no power to allocate the work to his employees. However, where, as in *George Koch,* the employer has validly promised to allocate that work, union pressure designed to force adherence to that promise should not be defined as secondary activity.

2. *Hot Cargo Clauses:* Marriott; Acco Equipment

a. *The Board's Hot Cargo Jurisdiction*—Section 8(e) of the Act[41] prohibits the making of agreements by a "labor organization" and an "employer" in which the employer agrees to refrain from transacting business with another person or to refrain from handling the products of another person. Thus, this "hot cargo clause" prohibition forbids the making of agreements whereby the employer agrees to assist the union in carrying out a secondary boycott against another person.[42] By prohibiting the employer from voluntarily agreeing with the union to engage in the secondary boycott against the third person, section 8(e) supplements section 8(b)(4)(B),[43] which prohibits a union from engaging in action designed to force the employer to boycott the products or business of the third person.

[40] 386 U.S. at 644.

[41] 29 U.S.C. § 158(e) (1970) states in relevant parts:

It shall be an unfair labor practice for any labor organization and any employer to enter into any contractor agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . . .

[42] National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612, 638 (1967).

[43] 29 U.S.C. § 158(b)(4)(B) (1970).

Enacted in 1959, both provisions were considered by legislators as an interlocking and extensive restraint on secondary activity. Although supplementary and intended by the legislative framers to affect a comprehensive proscription of secondary boycott activity,[44] section 8(b)(4)(B) prohibits a union from exerting pressure upon "any person" to force that person to boycott another person, while section 8(e) merely prohibits a union from making an agreement with "any *employer*" (emphasis added) to boycott another person.

In *Marriott Corp. v. NLRB*,[45] a Survey year decision, the Court of Appeals for the Ninth Circuit held that the section 8(e) prohibition of hot cargo agreements is not confined to those agreements made between a union and an "employer" who falls within the NLRA's statutory definition of that word.[46] Instead, the court's approval was given to the Board's assumption of jurisdiction over alleged hot cargo agreements between a labor organization under the Board's jurisdiction and an employer not within the Board's statutory jurisdiction, if their agreement to boycott such third person would affect employment conditions of employees who are subject to the Board's jurisdiction.[47] Thus, for purposes of jurisdiction over hot cargo agreements, the meaning of the word "employer" in section 8(e) is not confined to its statutory definition. According to the Board and the Ninth Circuit, section 8(e) prohibits agreements between a labor organization and *any person* to carry out a secondary boycott. If *Marriott* is followed, the Board will be permitted to invalidate hot cargo agreements effecting a secondary boycott to the same extent it is able, under section 8(b)(4)(B), to forbid the secondary boycott itself.

Since the Ninth Circuit approved the Board's interpretation of its hot cargo jurisdiction without a substantial degree of independent reasoning,[48] the Board's opinion[49] warrants close examination. Lufthansa Airlines and the Machinists Union negotiated a hot cargo provision. The concededly unlawful hot cargo provision provided that Lufthansa, whose New York in-flight food catering was performed by its own employees represented by the Machinists Union, would cease contracting out its catering requirements in other cities

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[44] 386 U.S. at 635-39.

[45] 491 F.2d 367, 85 L.R.R.M. 2257 (9th Cir. 1974).

[46] 29 U.S.C. § 152(2) (1970) excepts the federal, state, local governments, certain non-profit hospitals and those employers within the jurisdiction of the Railway Labor Act from the statutory definition of employer.

[47] Machinists Union (Lufthansa German Airlines), 197 N.L.R.B. No. 18, 80 L.R.R.M. 1305 (1972), enforced sub. nom., Marriott Corp. v. NLRB, 491 F.2d 367, 85 L.R.R.M. 2257 (9th Cir. 1974).

[48] 491 F.2d at 370, 85 L.R.R.M. at 2258-59.

[49] 197 N.L.R.B. No. 18, 80 L.R.R.M. 1305 (1972).

to non-union caterers. One of those non-union caterers was Marriot, whose catering contract was cancelled by Lufthansa after the latter had agreed to the hot cargo provision. Since Lufthansa was an employer subject to the jurisdiction of the Railway Labor Act,[50] it was exempt from the jurisdictional definition of "employer" under the NLRA.[51] The Machinists Union represented Lufthansa's catering employees who, as individuals employed by a Railway Labor Act employer, are not employees subject to the Board's jurisdiction.[52] Nevertheless, the Union was a labor organization subject to the Board's jurisdiction because approximately ninety percent of the total number of employees it represented were NLRA statutory employees, and because almost all of its collective bargaining agreements had been executed with employers subject to Board jurisdiction.[53]

The Board opinion contained a detailed comparative analysis of the legislative history of sections 8(e) and 8(b)(4)(B) and concluded that

> Congress in 1959 intended to make it an unfair labor practice for a labor organization . . . *to agree* with 'any person' that the latter would cease doing business with any other person. Thus, despite its use of the phrase 'any employer' in Section 8(e), it is clear from the above that Congress intended to enact in Section 8(e) a ban on hot cargo agreements at least as encompassing as the ban envisaged by the drafters of Section 8(b)(4)(B) which would have applied to hot cargo clauses executed by 'any person.'[54]

Thus, the Board was not persuaded to adopt the union's and Lufthansa's contention that section 8(e) did not prohibit the execution of this otherwise unlawful hot cargo provision. The union and Lufthansa conceded that had the union struck or exerted other pressure upon Lufthansa to force it to cease contracting out to the non-union caterer, Marriott, a violation of section 8(b)(4)(B) would have occurred.[55] Consequently, to sanction achievement of the same result by a section 8(e) hot cargo contract clause appeared illogical to the Board, especially since the entire thrust of the 1959 secondary

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[50] Id.

[51] 29 U.S.C. § 152(2) (1970).

[52] 29 U.S.C. § 152(3) (1970).

[53] 80 L.R.R.M. at 1305.

[54] Id. at 1310. Member Fanning in dissent engaged in a reading of the § 8(e) legislative history contrary to that of the Board majority. Id. at 1311, 1313.

[55] Id. at 1310.

boycott amemdments to the Act was the closing of loopholes previously existing.[56]

The Board's broad interpretation of its jurisdiction over hot cargo agreements appears justified. Its decision does not incorporate the entire National Labor Relation Act law into labor relations between Railway Labor Act employers and Railway Labor Act employees. Rather, the Board's decision merely prevents them from regulating the terms and conditions of employment of employees of a NLRA employer, such as Marriott, by means of a secondary boycott designed to unionize the NLRA employer. Furthermore, incorporation of only hot cargo law into Railway Act labor relations is a result apparently within the legislative intent.

Such incorporation does not affect labor relations between employers and unions subject to the Railway Labor Act since a hot cargo provision is one which, by definition, is designed to affect employment conditions of persons other than the contracting parties. Since Marriott was a NLRA-employer, supervision of its labor relations by the Board is permissible. The Board's decision, affirmed by the Ninth Circuit, does not appear to deny the union any legitimate economic weapons. The union would be prohibited from forcing the Railway Labor Act employer to boycott (the NLRA employer) by virtue of the section 8(b)(4)(B) prohibitions against such coercion of "any person." To deny them the right to achieve the same end by a contractual hot cargo provision is not unfair. However, it is not certain that the Board would assert hot cargo jurisdiction in a situation where the contracting union was not an NLRA statutory labor organization. This uncertainty results from the Board's reliance in *Marriott* upon the fact that although the contracting employer was not subject to its jurisdiction, the contracting union was.[57]

b. *Construction Industry Proviso*—Section 8(e)[58] prohibits the execution of hot cargo contractual clauses, *i.e.*, clauses in which the employer promises the union that it will boycott the products of another person or cease doing business with a third person.[59] The employer's promise may not be absolute, but may obligate him to boycott the third person, conditional upon the occurence of conditions precedent, such as the use by the third person of non-union labor.[60] Congress, however, carved out exceptions[61] to the hot cargo

[56] Id. at 1310-11.

[57] Id. at 1311.

[58] 29 U.S.C. § 158(e) (1970).

[59] See National Woodwork Mfrs. Ass'n, 386 U.S. 612, 638 (1967).

[60] See United Bhd. of Carpenters v. NLRB (Sand Door), 357 U.S. 93 (1958).

[61] Proviso to § 8(e) permits the execution of certain hot cargo agreements in the construction industry and the garment industry. 29 U.S.C. § 158(e) (1970).

clause prohibitions for the benefit of the construction industry, recognizing the exceptional need for union use of those clauses in that industry.[62]

Formulated as a proviso to section 8(e), the construction industry exception permits hot cargo agreements, between a labor union and a construction industry employer, relating to the "contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work."[63] In a Survey year case decided by the Board, *Acco Construction Equipment Inc.*,[64] the language of this proviso was held not to validate an otherwise unlawful hot cargo agreement which applied to the jobsite repair of equipment.

The union had a hot cargo contract with the general contractor providing that after the expiration of warranties on equipment used at the jobsite, any repairs could no longer be performed by the employees of the equipment dealer or manufacturer. After such time, the contract required that any equipment repairs be performed by the union's members.[65] Except for the statutory proviso, the contractual provision concededly would have been unlawful because it required the general contractor to cease doing business with another person, the equipment dealer. The general contractor breached the agreement by allowing the dealer's employees to perform the post-warranty jobsite repairs.[66] The union then invoked its

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[62] The structure of the employment relationship in the construction industry is different from that present in other industries, where the employees' working conditions are capable of formulation by negotiation directly with their employer. The typical construction employee is hired by an independent employer to whom a general contractor has subcontracted a portion of the project. From the viewpoint of the construction union, the unionization of their primary employers (the small subcontractors) to improve working conditions is nearly impossible unless the general contractor has the practice of awarding his work to unionized subcontractors. Unless the union could execute hot cargo clauses with general contractors to insure the use of that practice, the subcontracts would go to the less costly, non-union subcontractors, thus depriving the unionized subcontractors and their employees of work. Such a result would have seriously undermined unionization and the promotion of collective bargaining in that industry.

[63] The construction industry proviso to § 8(e), 29 U.S.C. § 158(e) (1970), states:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling . . . the products of any other employer, or to cease doing business with any other person, and any contract or agreement . . . shall be to such extent unenforceable and void: *Provided*, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating the contracting and subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work . . . .

[64] 204 N.L.R.B. No. 115, 83 L.R.R.M. 1457 (1973). See Comment, 15 B.C. Ind. & Com. L. Rev. 1292 (1974).

[65] 83 L.R.R.M. at 1457-58.

[66] Id.

contractually-designated remedy and "fined" the general contractor for his breach.

Upon the issuance of a section 8(e) complaint against the union, the Board held that as applied to *jobsite repair of equipment,* the hot cargo clause was not protected by the proviso.[67] The Board reasoned that although actually performed on the construction site, the jobsite repairs were not "work to be done at the site of the construction"—the validating language of the proviso.[68] The Administrative Law Judge, whose conclusions were adopted by the Board majority, had reasoned that because such repairs could have been performed off the jobsite, that work was not "*work to be done* at the site."[69] He further argued that since jobsite repairmen are only temporarily involved with the construction site, their work is not construction in nature and not within the scope of the hot cargo proviso.

Acco Equipment espouses a narrow reading of the language of that proviso. Although the majority opinion expressed the views of only three of the five Board Members,[70] the decision may indicate an increasing desire on the part of the Board to limit the hot cargo validating proviso through resort to strained statutory interpretations. Restricting such hot cargo provisions may encourage unrest in construction industry labor relations. Valid hot cargo clauses, though enforceable through suits, may not be enforced by economic weapons.[71] However, work preservation and union standards clauses, which may become replacements for the recently invalidated jobsite repair hot cargo clauses, are enforceable by resort to union self-help. Thus, the Board's *Acco Equipment* decision may lead to an increase in the use of economic weapons in the labor relations within the construction industry, and thus encourage industrial unrest.

III. ARBITRATION

A. *Arbitration of Safety Disputes:* Gateway Coal

The 1973-74 Survey year saw a significant application and refinement of the federal arbitration law originally outlined in 1960

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[67] Id. at 1458.

[68] Id.

[69] Id. (emphasis added).

[70] Chairman Miller and Members Jenkins and Penello were in the majority. Member Fanning dissented.

[71] See National Woodwork Mfrs. Ass'n v. NLRB, 386 U.S. 612 (1967); United Bhd. of Carpenters v. NLRB (Sand Door), 357 U.S. 73 (1958).

in the *Steelworkers Trilogy* cases.[1] In *Gateway Coal Co. v. United Mine Workers,*[2] the Supreme Court held that disputes over plant safety would be presumed to be covered by a broad arbitration contract provision, and that Section 502 of the Act[3] does not constitute a broad exception to the union's duty to arbitrate safety disputes.[4]

An understanding of *Gateway Coal* requires a brief review of the Supreme Court's arbitration decisions, commencing with the 1960 *Steelworkers* cases and culminating in 1970 in *Boys Market, Inc. v. Retail Clerks Union Local 770.*[5] In *Steelworkers,* the Supreme Court held that federal courts, when deciding whether a party had breached the collective bargaining agreement arbitration clause by refusing to arbitrate a particular dispute,[6] must presume that a broadly worded binding arbitration clause was intended to require arbitration of the instant dispute, unless the particular class of disputes was expressly excluded from the coverage of the clause.[7] The Court reasoned that this presumption of arbitrability of labor disputes was essential to, and warranted by, the congressionally-declared policy[8] of promoting the settlement of labor disputes by methods voluntarily agreed upon by the parties.

Two years later, in *Teamsters Local 174 v. Lucas Flour Co.,*[9] the Court expressed its belief that continued protection of the policy of promoting arbitration of industrial disputes required that a union be held to have impliedly agreed not to strike to resolve those disputes which it had promised would be resolved by binding arbitration. This implied no-strike promise of the union thus trans-

[1] United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[2] — U.S. — 94 S. Ct. 629, 637-38, 85 L.R.R.M. 2049, 2053-54 (1974).

[3] 29 U.S.C. § 143 (1970) states in pertinent part that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [will not] be deemed a strike . . . ."

[4] 94 S. Ct. at 640-41, 85 L.R.R.M. at 2058.

[5] 398 U.S. 235 (1970).

[6] Section 301 of the Act, 29 U.S.C. § 185(a) (1970), confers upon federal district courts jurisdiction over suits for breach of collective bargaining agreements. The contract law to be used must be fashioned by the federal courts, and applied by any state courts exercising jurisdiction over such suits. Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95, 104 (1962). Under *Steelworkers,* however, the courts are prohibited from inquiring into the merits of the labor dispute, and must limit their inquiry into whether the parties intended that the clause providing for binding arbitration cover the instant dispute. *Warrior and Gulf,* 363 U.S. 574, 583-85 (1960).

[7] 363 U.S. at 581.

[8] 29 U.S.C. § 173(d) (1970) states:

> Final adjustment by a method agreed upon by the parties is declared to be the desireable method for settlement of grievance disputes arising over the application of grievance disputes or interpretation of an existing collective-bargaining agreement.

[9] 369 U.S. 95 (1962).

formed an otherwise lawful strike into a breach of contract. Finally, in *Boys Market,*[10] the Court authorized federal courts to issue injunctions to halt strikes violative of the no-strike promise. Concluding that this authority was essential to the policy of promoting arbitration, the Court reasoned that unless employers are entitled to the most expeditious means of enforcing the union's no-strike promise, they will be discouraged from agreeing to the quid pro quo for the union's no-strike promise—binding arbitration.[11]

Unlike *Steelworkers,* where the disputes arose over economic matters such as discharge of employees,[12] in *Gateway Coal* the dispute concerned plant safety, which, according to the union, had been undermined by the employer's reinstatement of foremen convicted of falsifying company safety records.[13] The union walked out in protest over the allegedly unsafe situation created by the presence of the foremen, and refused the company's request to arbitrate the dispute under a contract provision calling for arbitration of "all local disputes."[14] The federal district court granted the company's request for a *Boys Market*-type injunction against the union's apparent breach of the no-strike promise, which was implied from its promise to use arbitration as the exclusive method of resolving "local disputes."[15] However, the Third Circuit, concluding that the nature of safety disputes and the section 502 protection for walkouts over unsafe working conditions distinguished *Gateway Coal* from *Steelworkers,*[16] reversed the district court. Although recognizing the *Steelworkers* mandate to presume that the arbitration provision was intended to cover all disputes not specifically excepted, the court of appeals reasoned that the labor policies justifying the presumption of arbitrability did not apply to safety disputes, since the lives rather than the mere economic well-being of the employees were at stake and since the section 502 exception of safety dispute walkouts from the definition of strikes indicated a congressional recognition of an exception to this arbitration policy.[17]

The Supreme Court took a different approach to the question of the relevance of section 502 to the presumption of arbitrability of safety disputes. The Third Circuit had analyzed section 502 in terms of its effect upon the labor policies behind the presumption of

[10] 398 U.S. 235 (1970).
[11] Id. at 247-48.
[12] *American Mfg. Co.,* 363 U.S. at 564-65. *Enterprise Wheel & Car,* 363 U.S. at 595.
[13] 94 S. Ct. at 634, 85 L.R.R.M. at 2050-51.
[14] Id. at 635, 85 L.R.R.M. at 2052.
[15] 80 L.R.R.M. 2634 (W.D. Pa. 1971).
[16] 466 F.2d 1157, 1160, 80 L.R.R.M. 3153, 3155 (3d Cir. 1972).
[17] Id. at 1160, 80 L.R.R.M. at 3155.

arbitrability. However the Supreme Court reasoned that the significance of section 502 was that it authorized a union to strike over safety issues despite its prior no-strike promise.[18] Thus section 502 appeared relevant only where the union had made a no-strike promise. To decide whether the Mine Workers had impliedly made such a promise, the Court stated that it must be determined initially whether the binding arbitration clause it had executed covered safety disputes, and thus constituted a *Lucas Flour* implied promise not to strike over these disputes.[19]

Seeing no reason to carve out an exception for safety disputes from the *Steelworkers* presumption of arbitrability, the Court concluded that the union had agreed to arbitrate the dispute.[20] The promotion of arbitration as a substitute for the use of economic weapons as the favored method of dispute resolution had been sanctioned in *Steelworkers* on the grounds that the parties had agreed to repose their confidence in an arbitrator who had knowledge of the practices in the industry and a sensitive awareness of the respective needs of the parties.[21] Noting that the arbitrator is capable of bringing such qualities to the resolution of safety as well as economic disputes, the Court in *Gateway Coal* saw no need to interpret the contract as excluding safety disputes from binding arbitration, especially since no specific exception was expressed in the language of the contract.[22] Furthermore, it appeared to the Court that the existence of plant safety would more likely be protected by "an informed and impartial assessment of the facts" rather than by resort to economic weapons.[23]

Thus, because of the Court's initial conclusion that the union had agreed to arbitrate safety disputes, under *Lucas Flour* the union also impliedly agreed not to strike to resolve these disputes. Ordinarily, the necessary result would be that the Mine Workers walkout constituted a breach of contract, and thus conduct enjoinable by the district court. However, section 502 states that "the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions of work" is not a strike.[24] The Court stated that under some circumstances, it would be constrained to agree with the Third Circuit's decision to reverse the order granting the injunction, since this statutory provision creates an exception to the

[18] 94 S. Ct. at 639, 85 L.R.R.M. at 2054-55.
[19] Id.
[20] Id. at 637-38, 85 L.R.R.M. at 2053-54.
[21] *Warrior & Gulf*, 363 U.S. at 581-82.
[22] 94 S. Ct. at 636-37, 85 L.R.R.M. at 2052-53.
[23] Id. at 637-38, 85 L.R.R.M. at 2053.
[24] 29 U.S.C. § 143 (1970).

implied no-strike promise that otherwise results from a promise to arbitrate the dispute.[25]

However, disagreeing with the Third Circuit, the Court held that section 502 did not authorize a strike over unsafe working conditions in all circumstances where the employees believe a safety hazard exists; instead objective evidence of a safety hazard rather than the employees' subjective belief was viewed as necessary to avoid unjustified resort to the protections of section 502.[26]

> Any employee who believes a supervisor or fellow-worker incompetent and who honestly fears that at some future time he may commit some unspecified mistake creating a safety hazard could demand his colleague's discharge and walk off the job despite the contractual agreement not to do so. Absent the most explicit statutory command, we are unwilling to conclude that Congress intended the public policy favoring arbitration and peaceful resolution of labor disputes to be circumvented by so slender a thread as subjective judgment. . . .[27]

Finding that the union had not advanced sufficient objective evidence of the actuality of hazardous conditions, the Court was unwilling to permit the union to use section 502 to immunize itself from a breach of its promise to arbitrate the dispute.[28]

Although this decision restricts the union's ability to force a repair of dangerous working conditions by resort to walkouts, it does not impose undue burdens upon the union. The union need only demonstrate objective evidence of the presence of a safety hazard to receive section 502 protections. This is a small price to pay for the promotion of arbitration, which would be undermined if the union could avoid its promise to arbitrate without the need for such justification. The decision to include safety disputes within the scope of the presumption of arbitrability is also devoid of harshness upon the union. Where it agrees to arbitrate "all local disputes," a contract interpretation placing safety disputes within that promise is not unreasonable. Furthermore, if the union wishes to carve out safety disputes as an area in which resolution through the use of economic weapons is permitted, it may insist on an arbitration clause which expressly excludes that class of disputes from the contractual provision requiring resolution of disputes by arbitration.

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[25] 94 S. Ct. at 640, 85 L.R.R.M. at 2056.
[26] Id. at 640-41, 85 L.R.R.M. at 2056.
[27] Id. at 641, 85 L.R.R.M. at 2056.
[28] Id.

B. *Grievance and Arbitration Proceedings—Effect on Title VII Actions:* Alexander

Prior to filing a complaint with a state fair employment agency or with the EEOC under Title VII, or before instituting a suit under section 1981 or 1983, an employee, whose employment contract is subject to a collective bargaining agreement, might first attempt to obtain relief from alleged discriminatory employment practices through the grievance and arbitration machinery under the collective bargaining agreement. The Supreme Court has noted that Congressional policy endorses the promotion of industrial stabilization through the collective bargaining agreement[1] and there would appear to be no reason why this policy should not extend to controversies involving charges of employment discrimination. The Supreme Court affirmed this policy in the *Steelworkers Trilogy*[2] where it stated, in *United Steelworkers v. Warrior & Gulf Navigation Co.*,[3] that "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute"[4] and that questionable cases should be resolved in favor of coverage.[5] Moreover, the *Steelworkers Trilogy* established that questions of interpreting the collective bargaining agreement should be left to the arbitrator,[6] and that the function of the courts is limited to a determination of "whether the party seeking arbitration is making a claim which on its face is governed by the contract."[7] Further, an employee must exhaust the established grievance and arbitration remedies before filing suit to enforce specific contractual rights.[8]

As a consequence of the *Steelworkers Trilogy*, the federal courts have reached varying results[9] in determining whether an employee's

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[1] Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455, 40 L.R.R.M. 2113, 2115 (1957).

[2] United Steelworkers v. American Mfg. Co., 363 U.S. 564, 46 L.R.R.M. 2414 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 46 L.R.R.M. 2416 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 46 L.R.R.M. 2423 (1960).

[3] 363 U.S. 574, 46 L.R.R.M. 2416 (1960).

[4] 363 U.S. at 582-83, 46 L.R.R.M. at 2419-20.

[5] Id. at 583, 46 L.R.R.M. at 2420.

[6] 363 U.S. at 569, 46 L.R.R.M. at 2416, 363 U.S. at 599, 46 L.R.R.M. at 2426.

[7] 363 U.S. at 568, 46 L.R.R.M. at 2415.

[8] Republic Steel Corp. v. Maddox, 379 U.S. 650, 652, 657, 58 L.R.R.M. 2193, 2194, 2196 (1965).

[9] See, e.g., Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971), aff'g 429 F.2d 324, 332, 2 FEP Cases 687, 692 (6th Cir. 1970); Oubichon v. North American Rockwell Corp., 482 F.2d 569, 574, 6 FEP Cases 171, 175 (9th Cir. 1973); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979, 990-91, 5 FEP Cases 994, 1001-02 (D.C. Cir. 1973); Rios v. Reynolds Metals

statutory right to a trial *de novo* under Title VII may be foreclosed by prior submission of his claim to final arbitration. Since the union rather than the employee has control over the presentation of a grievance, the employee's interests may not be adequately represented during arbitration when the union has interests adverse to those of the aggrieved employee.[10] In determining the effect of arbitration awards upon subsequent Title VII actions, some courts adopted rules of preclusion.[11] Where the union has inadequately represented the employee, such rules operate to deprive an employee of his Title VII rights if the decision of the arbitrator is adverse.

In a landmark decision during the Survey year, *Alexander v. Gardner-Denver Co.*,[12] The Supreme Court held that an employee may institute a Title VII suit following an adverse grievance-arbitration award. In reaching this result, the Court concluded that the *Steelworkers Trilogy* did not require a rule precluding the institution of post-arbitral actions to enforce Title VII rights and rejected the minority rule that a voluntary election to pursue a grievance to final arbitration under the nondiscrimination clause of a collective bargaining agreement constitutes a binding election of remedies.[13] The decision of the Seventh Circuit in *Bowe v. Colgate-Palmolive Co.*[14] foreshadowed the holding of the Supreme Court in *Alexander*. The Seventh Circuit, in a sex-discrimination case, held that an employee is not required to make a binding election of remedies *prior* to adjudication of a Title VII claim of employment discrimination, but that such an election should be made after adjudication to preclude unfair duplicate relief.[15] Arbitrators and the NLRB have concurrent jurisdiction to resolve unfair labor practice disputes. Similarly, the Seventh Circuit held that arbitrators and the courts have concurrent jurisdiction to decide

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Co., 467 F.2d 54, 58, 5 FEP Cases 1, 4 (5th Cir. 1972); Newman v. Avco Corp., 451 F.2d 743, 746-47, 3 FEP Cases 1137, 1140 (6th Cir. 1971); Hutchings v. United States Indus., Inc., 428 F.2d 303, 2 FEP Cases 725, 733 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715, 2 FEP Cases 121, 123 (7th Cir. 1969).

[10] Comment, 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1353-54 (1972). See Vaca v. Sipes, 386 U.S. 171, 186 (1967); Republic Steel Co. v. Maddox, 379 U.S. 650, 652 (1963).

[11] See Alexander v. Gardner-Denver Co., 466 F.2d 1209, 1210, 4 FEP Cases 1210 (10th Cir. 1972), rev'd, 94 S. Ct. 1011, 7 FEP Cases 81 (1974); Dewey v. Reynolds Metals Co., 429 F.2d 324, 332, 2 FEP Cases 687, 692 (6th Cir. 1970) aff'd, 402 U.S. 689 (1971).

[12] 94 S. Ct. 1011, 7 FEP Cases 81 (1974).

[13] 94 S. Ct. at 1020-22, 7 FEP Cases at 86-87.

[14] 416 F.2d 711, 2 FEP Cases 121 (7th Cir. 1969). For a discussion of prior cases involving the issue of the effect of grievance and arbitration upon Title VII actions, see Comment, 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1353-61 (1972); Comment, 1972-1973 Annual Survey of Labor Relations Law, 14 B.C. Ind. & Com. L. Rev. 1173, 1184-86 (1973).

[15] 416 F.2d at 715, 2 FEP Cases at 123.

Title VII issues.[16] Furthermore, the Seventh Circuit noted the distinction between the processes of arbitration and judicial action and the remedies afforded by each. The Supreme Court apparently adopted this rationale in *Alexander*.[17]

In *Hutchings v. United States Industries, Inc.*,[18] the *Bowe* rule of rejecting the election of remedies doctrine in Title VII actions was applied where the plaintiff, unlike the plaintiff in *Bowe*, had exhausted his collective bargaining agreement remedies prior to instituting his Title VII action for racial discrimination. Although the record did not reveal whether Title VII rights, or similar contractual rights were considered,[19] the Fifth Circuit held that the prior adverse arbitration award did not bar a subsequent Title VII suit.[20] However, the possibility of adopting a policy of deferral to arbitration in Title VII cases presenting circumstances different from those in *Hutchings* was explicitly left open.[21]

In *Rios v. Reynolds Metals Co.*,[22] the Fifth Circuit adopted and applied a standard of conditional deferral to arbitration awards; thereby exercising the option it had reserved in *Hutchings*. The distinguishing circumstances referred to in *Hutchings* were present: the collective bargaining agreement included an obligation upon the employer not to discriminate in violation of Title VII; and the arbitrator expressly rejected a claim that the employer had breached this duty.[23] The *Rios* court adopted a complex and limited policy of deferral to arbitration in Title VII cases, expanding upon the NLRB's standard of deferral announced in *Spielberg Mfg. Co.*[24] The court in *Rios* established the following standard:

> First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII. Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence

[16] Id. at 714-15, 2 FEP Cases at 122.
[17] 94 S. Ct. at 1020-22, 7 FEP Cases at 86-87.
[18] 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970) (racial discrimination).
[19] Id. at 314 n.10, 2 FEP Cases at 733 n.10.
[20] Id. at 314, 2 FEP Cases at 733.
[21] Id. at 314 n.10, 2 FEP Cases at 733 n.10.
[22] 467 F.2d 54, 5 FEP Cases 1 (5th Cir. 1972) (national origin discrimination).
[23] Id. at 55-56, 5 FEP Cases at 2.
[24] 112 N.L.R.B. 1080, 1082, 36 L.R.R.M. 1152, 1153 (1955).

> presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities.[25]

Rios marked a retreat from the broad implications of *Hutchings*. It is submitted that, under the limited circumstances specified in *Rios*, the Fifth Circuit ratified a standard analagous to that previously adopted by the Sixth Circuit.

In *Dewey v. Reynolds Metal Co.*,[26] the Sixth Circuit held that a prior adverse arbitration award precluded a subsequent Title VII action,[27] reasoning that arbitrators have authority to make final determinations of issues of Title VII civil rights violations.[28] However, in *Newman v. Avco Corp.*,[29] the Sixth Circuit permitted a Title VII action subsequent to an adverse arbitration award. The court stated that it had applied the doctrine of estoppel in *Dewey*, rather than the doctrine of election of remedies, and that district court jurisdiction over Title VII claims, which had been conferred by statute, could not be removed by contractual agreement.[30] In rationalizing the apparent conflict with *Dewey*, the Sixth Circuit in *Newman* asserted that the rule it had applied in the former case required deferral to arbitral fact finding "where the parties have agreed to resolve their grievances before (1) a fair and impartial tribunal (2) which had *power to decide them* . . . ."[31] It then purported to apply this two-part rule of estoppel and distinguished *Dewey* on the basis of: (1) the doubtful fairness of the arbitration proceeding; and (2) the arbitrator's lack of contractual power to determine the issue of discrimination.[32] The charge that the union and the employer conspired in maintaining a scheme of racial discrimination made the fairness of the arbitration proceeding questionable.[33] Further, the court concluded that, since the collective bargaining agreement limited the arbitrator's jurisdiction to issues of contract interpretation, and since the contract contained no

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[25] 467 F.2d at 58, 5 FEP Cases at 4.

[26] 429 F.2d 324, 2 FEP Cases 687 (6th Cir. 1970), aff'd mem., 402 U.S. 689 (1971). (The judgment was affirmed by an equally divided court.)

[27] 429 F.2d at 332, 2 FEP Cases at 69.

[28] Id.

[29] 451 F.2d 743, 3 FEP Cases 1137 (6th Cir. 1971) (racial discrimination).

[30] Id. at 746, 3 FEP Cases at 1139.

[31] Id. at 747, 3 FEP Cases at 1140. The grievance complaint included a charge of discrimination and the Sixth Circuit stated that the arbitration award was adverse "on all grounds." Id. at 745, 3 FEP Cases at 1139. Thus, it would appear that the arbitrator expressly considered the charge of discrimination.

[32] Id. at 748, 3 FEP Cases at 1141.

[33] Id. at 747-48, 3 FEP Cases at 1140-41.

prohibition against the form of discrimination alleged, the arbitrator lacked authority to determine the issue of racial discrimination.[34]

As a result of *Newman,* it would appear that the Sixth Circuit had adopted a policy of conditional deferral to arbitration in Title VII actions not dissimilar from that subsequently adopted by the Fifth Circuit in *Rios*. The court in *Newman* implied that it would defer to arbitration where: (1) the fairness of the arbitration proceeding is not brought into question; (2) the collective bargaining agreement explicitly proscribes the form of discrimination charged; and (3) the arbitrator determined the issues. The standard of deferral adopted by the Fifth Circuit in *Rios* included the substance of these requirements. In addition, *Rios* required findings by the district court: that the identical factual issues decided by the arbitrator were presented; that the evidence relating to those factual issues was adequately presented in the arbitral hearing; and that the arbitrator decided the factual issues presented to the court. Thus, the *Rios* standard of deferral is rigorous and limited in scope. However, it would appear that *Rios* and *Newman* are similar insofar as both decisions would permit deferral to arbitration under certain circumstances and reject an absolute rule of permissibility of Title VII actions subsequent to an adverse arbitration award.

In contrast to the development represented by *Rios,* the trend of decisions[35] during the Survey year, which progressed logically to the decision in *Alexander,* rejected application of a rule of preclusion and indicated disinterest in adopting a policy of deferral to arbitration in Title VII actions. In *Macklin v. Spector Freight Systems, Inc.,*[36] the plaintiff instituted a class action, charging that the employer and the union engaged in a continuing conspiracy to discriminate against black employee members through the maintenance of a discriminatory hiring and job assignment system.[37] The employee also claimed that the union inadequately represented his in-

[34] Id. It has been suggested that the *Newman* rationale that the arbitrator lacked authority to decide the issue of racial discrimination is also applicable to *Dewey*. The evidence relied upon by the Sixth Circuit in *Dewey* did not include a prohibition of discrimination in the collective bargaining agreement. Comment, 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1359-60 (1972).

[35] See text at notes 36-51, infra. But cf. Rose v. Bridgeport Brass Co., 487 F.2d 804, 811-12, 6 FEP Cases 837, 843 (7th Cir. 1973).

[36] 478 F.2d 979, 5 FEP Cases 994 (D.C. Cir. 1973). Although the plaintiff did not file charges with the EEOC until more than 210 days (the time limit under 42 U.S.C. § 2000e-5(d) (1970), as amended, 42 U.S.C. § 2000e-5(e) (Supp. II, 1972)) after the occurrence of the allegedly unlawful employment practice, the court held that the allegations of a conspiracy continuing up to the time charges were filed constituted a timely filing. 478 F.2d at 987, 5 FEP Cases at 999. Title VII, as amended, permits charges to be filed up to 300 days from the date of occurrence of the unfair labor practice charge where the complaint is initially referred to an appropriate state agency. 42 U.S.C. § 2000e-5(e) (Supp. II, 1972).

[37] 478 F.2d at 983, 5 FEP Cases at 995-96.

terests, both in collective bargaining and in the grievance proceedings which had resulted in a determination adverse to the employee.[38] The District of Columbia Circuit held that the plaintiff was not estopped by the adverse result in the grievance proceedings and rejected the contention that the election of remedies doctrine applies in employment discrimination cases.[39]

In reaching the conclusion that *Dewey* did not require application of the doctrine of estoppel in the instant case, the court distinguished *Dewey*, reasoning that the grievance committee in *Macklin* "did not confront the racial discrimination question . . . pressed before EEOC and the District Court," while the arbitrator had reached and determined the religious discrimination issue in *Dewey*.[40] Therefore, the court concluded that "one of *Dewey's* major underpinnings—the desirability of avoiding relitigation of issues already heard in private grievance proceedings—is not applicable here."[41]

Next, the election of remedies doctrine was considered. This doctrine would bind the complaining employee to the outcome of the initial grievance and arbitration proceedings where the individual's fundamental objective was the same in subsequent court proceedings, regardless of whether the employee "proceeded under varying theories and factual claims in the different proceedings."[42] Noting that all circuits which had considered the issue of the application of the doctrine of election of remedies in a Title VII case had rejected that rule, the court in *Macklin* also held the doctrine inapplicable.[43]

In *Oubichon v. North American Rockwell Corp.*,[44] the Ninth Circuit rejected the election of remedies doctrine in a Title VII action where the prior grievance proceedings resulted in a *favorable* award.[45] In dictum, some courts had expressed disapproval of a holding which would permit an employer to maintain a Title VII

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[38] Id. at 988-89, 5 FEP Cases at 1000.

[39] Id. at 990-91, 5 FEP Cases at 1001-02.

[40] Id. at 990, 5 FEP Cases at 1001-02. The court, referring to *Dewey* stated that an evenly divided vote of the Supreme Court "ordinarily is not viewed as a judgment on the merits." Moreover, the grievance and arbitration awards in *Macklin* could only be made on the basis of provisions of the contract. Id.

[41] Id., 5 FEP Cases at 1002.

[42] Id. at 991, 5 FEP Cases at 1002.

[43] Id. Citing Vaca v. Sipes, 386 U.S. 171, 64 L.R.R.M. 2369 (1967), the court reasoned that the finality of grievance and arbitration awards is not absolute, even outside of the context of Title VII, if a breach of the duty of fair representation is alleged. 478 F.2d at 992, 5 FEP Cases at 1003.

[44] 482 F.2d 569, 6 FEP Cases 171 (9th Cir. 1973). As in *Macklin*, jurisdiction was based upon allegations of a chain of discriminatory action. Id. at 571, 6 FEP cases at 172.

[45] 482 F.2d at 573, 6 FEP Cases at 174. See Rose v. Bridgeport Brass Co., 487 F.2d at 812, 6 FEP Cases at 843.

action subsequent to a favorable grievance or arbitration award.[46] However, the Ninth Circuit reasoned that "judicial relief can be tailored to avoid duplication and windfall gains."[47] *Oubichon* is significant for establishing the rule that acceptance of a prior favorable grievance or arbitration award or settlement is prima facie evidence of full compensation for individual damages, but does not bar all Title VII relief.[48] The Ninth Circuit developed the burden of proof requirements in such a case.

> After an employee accepts an out-of-court settlement for a grievance arising out of a civil rights claim, he will have the burden of proving that what he received was not intended to be a complete settlement of his claim for money damages. If he can prove that the apparent settlement was not based on the full range of issues cognizable under Title VII, or that it was cognizable only as a partial settlement because the grievance artibration machinery was limited in its available remedies, the plaintiff may press for additional money damages.[49]

The holding in *Oubichon* foreshadowed the sweeping rejection of the doctrine of election of remedies by the Supreme Court in *Alexander,* for *Oubichon* bars subsequent judicial relief in a Title VII action only in circumstances where such relief will result in duplicate recoveries, but not necessarily where the judicial relief merely supplements a grievance or arbitration award.

When the Supreme Court determined in *Alexander* that prior submission of a claim to final arbitration does not bar a subsequent Title VII action, its rejection of a strict application of the doctrine of election of remedies followed a clearly developed line of precedent.[50] However, the Supreme Court's broad repudiation of waiver and deferral in Title VII actions, as well as its failure to discuss the

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[46] See Newman v. Avco Corp., 451 F.2d 743, 749, 3 FEP Cases 1137, 1141 (6th Cir. 1971); Hutchings v. United States Indus., Inc., 428 F.2d 303, 314, 2 FEP Cases 725, 733 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 715, 2 FEP Cases 121, 123 (7th Cir. 1969).

[47] 482 F.2d at 573, 6 FEP Cases at 174.

[48] Id. at 574, 6 FEP Cases at 175.

[49] Id.

[50] See Oubichon v. North American Rockwell Corp., 482 F.2d 569, 572-73, 6 FEP Cases 171, 173-74 (9th Cir. 1973); Macklin v. Specttor Freight Sys., Inc., 478 F.2d 979, 990-91, 5 FEP Cases 994, 1002 (D.C. Cir. 1973); Voutsis v. Union Carbide Corp., 452 F.2d 889, 893-94 (2d Cir.), cert. denied, 406 U.S. 889 (1971); Newman v. Avco Corp., 451 F.2d 743, 746 n.1, 3 FEP Cases 1139, 1140 n.1 (6th Cir. 1971); Hutchings v. United States Indus., Inc., 428 F.2d 303, 314, 2 FEP Cases 725, 732-33 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 714-15, 2 FEP Cases 121, 123 (7th Cir. 1969).

doctrine of estoppel, marked a sharp departure from the rationale of prior decisions in several lower federal courts.[51]

In *Alexander,* the union processed the employee's complaint of unjust discharge and his demand for reinstatement with back pay under a collective bargaining agreement which included a clause stating that "'there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry . . . .' "[52] The arbitrator ruled that the company had justifiably discharged petitioner and the EEOC found no reasonable cause to believe that a violation of Title VII had occurred,[53] Alexander instituted a civil suit, but the trial court granted the defendant's motion for summary judgment.[54]

In reversing the decision of the Tenth Circuit, which had affirmed the judgment of the district court,[55] the Supreme Court considered several issues: election of remedies, powers and functions of arbitrators, waiver of Title VII rights, and deferral to arbitration in the context of the purpose and structure of Title VII. The Court omitted a discussion of the doctrine of estoppel. However, the holding that an employee may fully pursue both grievance-arbitration remedies and a Title VII action would seem to imply a rejection of a rule of estoppel in Title VII actions: "The federal court should consider the employee's claim *de novo.* The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."[56]

The doctrine of election of remedies only applies in situations where legally or factually inconsistent remedies, relating to the same rights, are pursued and, therefore, the Supreme Court concluded that the doctrine does not apply to cases such as *Alexander.*[57] "In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under a collective-bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress."[58] The Court

[51] See, e.g., Alexander v. Gardner-Denver Co., 466 F.2d 1209, 4 FEP Cases 1210 (10th Cir. 1972), rev'd, 94 S. Ct. 1012, 7 FEP Cases 81 (1974); Dewey v. Reynolds Metals Co., 429 F.2d 324, 2 FEP Cases 687 (6th Cir. 1970), aff'd mem., 402 U.S. 89 (1971).

[52] 94 S. Ct. at 1015, 7 FEP Cases at 82. However, the petitioner, Alexander, did not raise the claim that his discharge resulted from racial discrimination until the last of four prearbitration proceedings. The union introduced the petitioner's charge at the arbitration hearing and the union representative testified that the employer's usual practice was to transfer employees back to their former positions rather than to discharge them when they performed inadequately. Id. at 1016-17, 7 FEP Cases at 82-83.

[53] Id. at 1017, 7 FEP Cases at 83.

[54] 346 F. Supp. 1012, 4 FEP Cases 1205 (D. Colo. 1971).

[55] 466 F.2d 1209, 4 FEP Cases 1210 (10th Cir. 1972).

[56] 94 S. Ct. at 1025, 7 FEP Cases at 90.

[57] Id. at 1020, 7 FEP Cases at 86.

[58] Id.

stated that the relationship between the two forums, courts and arbitrators, was complementary rather than mutually exclusive, and analogized the remedial and enforcement procedures to those under the National Labor Relations Act[59] when both contractual and statutory rights are involved in a single dispute.[60]

> Where the statutory right underlying a particular claim may not be abridged by contractual agreement, the Court has recognized that consideration of the claim by the arbitrator as a contractual dispute under the collective-bargaining agreement does not preclude subsequent consideration of the claim by the National Labor Relations Board as an unfair labor practice charge or as a petition for clarification of the union's representation certificate under the Act.[61]

Therefore, the Court rejected the application of the doctrine of election of remedies and, on similar grounds, disposed of the assertion that the petitioner waived his cause of action under Title VII. The Court reasoned that permitting prospective waiver of Title VII rights through the collective bargaining process would defeat the Congressional purpose in enacting Title VII—to guarantee that employees are free from discriminatory employment practices.[62] The Title VII right to equal employment opportunities belongs to the individual employee and may not be waived by the union. This distinguishes that right from other statutory rights, such as the right to strike, which are conferred on employees collectively.[63] Therefore, the Court declined to hold that pursuit of relief through grievance and arbitration amounts to a waiver of a Title VII cause of action.

In addition to rejecting a rule of preclusion, the Court refused to adopt a policy of deferral to arbitration analogous to the policy adopted by the NLRB in *Spielberg Manufacturing Co.*[64] or by the Fifth Circuit in *Rios.*[65] Urging adoption of a rule similar to the NLRB policy enunciated in *Spielberg,* the respondent contended that federal courts should defer to arbitration in Title VII suits where: "(i) the claim was before the arbitrator; (ii) the collective-bargaining agreement prohibited the form of discrimination charged . . . and (iii) the arbitrator has authority to rule on the claim and to

[59] 29 U.S.C. §§ 151 et seq. (1970).
[60] 94 S. Ct. at 1020, 7 FEP Cases at 86.
[61] Id. at 1020-21, 7 FEP Cases at 86.
[62] Id. at 1021, 7 FEP Cases at 87.
[63] Id.
[64] 112 N.L.R.B. 1080, 1082, 36 L.R.R.M. 1152, 1153 (1955).
[65] 467 F.2d 54, 5 FEP Cases 1 (5th Cir. 1972).

fashion a remedy."[66] However, the Court reiterated its conclusion that Congress intended federal courts to exercise final enforcement authority under Title VII.[67] The arbitral process could not adequately protect and enforce Title VII rights: arbitrators lack the expertise of courts in public law concepts and the informality of the fact-finding process in arbitration makes it less appropriate for resolution of Title VII issues.[68]

The Court refused to adopt the "more demanding deferral standard"[69] of *Rios* and noted that a narrow deferral policy might have the detrimental effect of increasing the complexity of arbitration to insure compliance with that standard, thus reducing the effectiveness and expediency of arbitration and undermining the policy of voluntary settlement of disputes.[70] Moreover, a deferral rule, like a rule of preclusion, might undermine the arbitration system by causing employees to bypass arbitration and go directly to court.[71] Thus, *Alexander* marks a sharp disapproval of *Rios,* and it is extremely unlikely that a rule similar to that adopted by the Fifth Circuit would now be upheld by the Court in Title VII actions.

Although a rule of deferral to arbitration would appear to present an irreconcilable conflict with *Alexander,* the Court there sanctioned a policy of according "great weight" to arbitral decisions where full consideration has been given to an employee's Title VII rights.[72] It is submitted that this approach represents a proper balancing of "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices . . . ."[73] A rule of deferral to arbitration is inappropriate in Title VII cases because Congress has determined that courts alone should have authority to finally determine the merits of charges of employment discrimination, and because arbitration procedures afford imperfect protection of individual rights. Furthermore, as the Court stated in *Alexander,* a limited rule of deferral would unduly complicate arbitration and might cause grievants to bypass arbitration altogether.

Like the deferral standard, the proposition advanced by the employer in *Alexander,* that a rule of preclusion is appropriate in Title VII actions subsequent to grievance and arbitration awards, draws some support from several arguments. These include the

[66] 94 S. Ct. at 1023, 7 FEP Cases at 88.
[67] Id. at 1023-24, 7 FEP Cases at 88.
[68] Id. at 1024, 7 FEP Cases at 89.
[69] Id. at 1023-25, 7 FEP Cases at 89-90.
[70] Id. at 1025, 7 FEP Cases at 90.
[71] Id.
[72] Id. at 1025 n.21, 7 FEP Cases at 90 n.21.
[73] Id. at 1025, 7 FEP Cases at 90.

contentions that a contrary holding such as *Alexander* will have several adverse effects: impairment of the effectiveness and desirability of arbitration agreements, unfairness to employers required to defend in two forums, and time and cost inefficiencies. It is submitted that the Supreme Court correctly found these contentions insufficient to sustain a rule that an employee's statutory right to a trial *de novo* under Title VII may be foreclosed by prior submission of his claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement.

The district court in *Alexander* adopted one argument in favor of a rule of preclusion in concluding that a rule permitting Title VII actions subsequent to adverse arbitration awards would substantially undermine the employer's incentive to arbitrate and might result in the eventual disappearance of arbitration clauses from labor agreements.[74] In contrast, the Supreme Court persuasively reasoned that the union's no-strike pledge is the primary incentive for an employer to enter into an arbitration agreement, and therefore that "most employers will regard the benefits derived from a no-strike pledge as outweighing whatever costs may result from according employees an arbitral remedy against discrimination in addition to their judicial remedy under Title VII."[75] Moreover, the Court soundly concluded that the expediency and cost-saving nature of arbitration would preserve its usefulness in employment discrimination controversies.[76]

It might be contended that *Alexander* is unfair to employers because it requires them to defend against the same charges twice. However, a rule of preclusion could result in unfairness to the employee in the form of insufficient protection of Title VII rights. Where the interests of the union differ from those of the employee, considerations of the possibility of inadequate representation of the grievant's rights and interests by the union in grievance and arbitration proceedings support a rejection of any rule of preclusion in Title VII actions. The courts are the only impartial forums in such cases with authority to enforce the individual's rights to be free from discrimination in employment. The Court rejected another contention: ". . . that to permit an employee to have his claim considered in both the arbitral and judicial forums would be unfair since this would mean that the employer but not the employee was bound by the arbitral award."[77] Significantly, the Court explained the relationship between arbitration and Title VII actions.

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[74] 346 F. Supp. at 1019, 4 FEP Cases at 1209.
[75] 94 S. Ct. at 1023, 7 FEP Cases at 88.
[76] Id.
[77] Id. at 1022, 7 FEP Cases at 87-88.

> This argument mistakes the effect of Title VII. Under the *Steelworker's Trilogy,* an arbitral decision is final and binding on the employer and employee, and judicial review is limited as to both. *But in instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision.* Rather, he is asserting a statutory right independent of the arbitration process.[78]

The need to insure aggrieved individuals of an opportunity to fully vindicate their statutory right to be free from employment discrimination requires the rule that an employee is not foreclosed from bringing suit under Title VII subsequent to final arbitration of the employee's claim.

It would seem beyond dispute that the public interest in protecting Title VII rights outweighs any argument that a rule of preclusion, such as the doctrine of estoppel or election of remedies, should be applied in Title VII cases based on the additional time and cost of defending in two forums. Unlike other rights, such as the right to strike, which are "conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinquished by the union as collective bargaining agent to obtain economic benefits for unit members. . . ."[79] Title VII rights belong to the individual. Arbitration machinery provides insufficient protection of such individual statutory rights and a rule of preclusion would have the consequence of permanently depriving an employee of his Title VII rights where the union representation is inadequate, or the available remedies, or the arbitration procedures are insufficient. Thus, both preclusion and deferral rules are inappropriate in Title VII cases. Moreover it is clear that *Alexander* properly implements the decision of Congress to vest the courts with exclusive final authority to determine Title VII rights and to give relief for their violation.

IV. Minority Group Activity—Unauthorized Racial Protest as Protected Activity: The Emporium

In a controversial Survey year decision, *Western Addition Community Organization v. NLRB (Emporium),*[1] the Court of Appeals for the District of Columbia Circuit has defined a protest by minority group employees against alleged employer racial discrimi-

[78] Id. (Emphasis added).

[79] Id.

[1] 485 F.2d 917, 83 L.R.R.M. 2738 (D.C. Cir. 1973), cert. granted, — U.S. —, 94 S. Ct. 1407 (1974). For analyses of *Emporium,* see Note, 15 B.C. Ind. & Com. L. Rev. 1198 (1974); Recent Cases, 87 Harv. L. Rev. 656 (1974).

nation as a concerted activity protected from employer interference, although such protest was unauthorized by the union and in contravention of the collective bargaining agreement grievance-arbitration provision. In *Emporium,* the District of Columbia Circuit held that an employer violated section 8(a)(1)[2] by discharging two black employees who picketed the employer's retail store to protest alleged employer racial discrimination against employees.[3] The Board had dismissed the section 8(a)(1) complaint against the employer, and adopted the findings of the Administrative Law Judge.[4] He had found that although the discharged employees were engaging in "concerted activities"[5] within the meaning of section 7,[6] they did not receive section 7 protection from employer interference because the activities were unauthorized by the exclusive bargaining representative and in derogation of the collective bargaining agreement.[7]

Several black employees of the Emporium had complained to the union, their exclusive bargaining representative, about racial discrimination by the Emporium, citing both the employer's alleged discriminatory promotion structure and specific cases of alleged discrimination against individual employees. The union agreed that the employer was violating the contract provision prohibiting racial discrimination, and promptly set the contractual grievance-arbitration machinery into motion.[8] Nevertheless, the black employees, claiming to speak for all minority group employees at the Emporium, objected to the union-desired method of prosecuting the grievances on an individual case-by-case method and to the time-consuming nature of the contractual-arbitration procedure.[9] Instead they sought a broad solution to the problem of racial discrimination that would improve the situation of all minority group employees at the Emporium.[10] After rejecting union requests to abide by the contract method of resolving grievances, the two black employees picketed the Emporium, distributing literature which encouraged a consumer boycott of the employer's store.[11] After an initial warning from the employer, the employees continued picketing, and were

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[2] 29 U.S.C. § 158(a)(1) (1970).

[3] 485 F.2d at 922, 83 L.R.R.M. at 2741.

[4] 192 N.L.R.B. 173, 179, 77 L.R.R.M. 1669, 1670 (1971).

[5] Id. at 185, 77 L.R.R.M. at 1670-71.

[6] 29 U.S.C. § 157 (1970).

[7] 192 N.L.R.B. at 185-86, 77 L.R.R.M. at 1671.

[8] 485 F.2d at 920-21 & nn.3-5, 83 L.R.R.M. at 2739-40 & nn.3-5. The collective bargaining agreement contained no-strike and no-lockout clauses, thus replacing the use of economic weapons with the grievance-arbitration machinery as the means of dispute resolution.

[9] Id. at 921-22, 83 L.R.R.M. at 2740-41.

[10] Id.

[11] Id. at 922, 83 L.R.R.M. at 2741.

therefore discharged. Although the conduct consisted of picketing and literature distribution, the discharged employees conceded that the conduct was intended to induce the president of the Emporium to meet separately with them to discuss a settlement.[12]

The circuit court initially noted that the union had fulfilled its statutory duty of fair representation when it sought to remedy the discrimination by resort to the contractual grievance-arbitration process.[13] Therefore, the issue was not whether a racial minority had a protected right to bypass the collective bargaining agreement in pursuit of its unique needs if the bargaining representative itself had neglected its collective bargaining obligations to the employees. Here, the bargaining representative differed with the minority group employees only over the proper methods to be used to remedy the employer's racial discrimination. The issue in *Emporium* was whether a racial minority of the employees has the right to engage in conduct designed to induce the employer to bargain with them over the issue of racial discrimination rather than with the statutory exclusive bargaining representative.[14] The court held that the racial minority received protection under section 7 despite their efforts to induce negotiation with the employer outside of the collective bargaining process, since the union was not "actually remedying the discrimination *to the fullest extent possible, by the most expedient and efficacious means.*"[15]

The court carefully limited its holding to cases in which a group of employees is protesting *racial discrimination* by the employer.[16] The majority conceded[17] that even this limited exception to the policy of the Act of promoting collective bargaining[18] between the exclusive bargaining representative of the employees and the employer would obstruct that policy to some degree by: first, derogating the statutory authority of the exclusive bargaining agent to negotiate with the employer to set the conditions of employment for all the unit employees; and second, by requiring the employer to tolerate bargaining advances made by claimed representatives other

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[12] Id. at 923, 83 L.R.R.M. at 2741-42.

[13] Id. at 930, 83 L.R.R.M. at 2747. The duty of fair representation has been interpreted as the corollary of the § 9(a) authority of the exclusive bargaining representative. 29 U.S.C. § 159(a) (1970). Section 9(a) gives the representative-union the exclusive authority to bargain for the conditions of employment of all the employees in the unit. However, the authority to bind all the employees by its agreements with the employers exists only where the union has fulfilled its duty to fairly represent all employees. See, e.g., Vaca v. Sipes, 386 U.S. 171 (1967); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

[14] See *Emporium*, 192 N.L.R.B. at 185-86, 77 L.R.R.M. at 1671.

[15] 485 F.2d at 931, 83 L.R.R.M. at 2748.

[16] Id. at 927, 83 L.R.R.M. at 2745.

[17] Id. at 929, 83 L.R.R.M. at 2746.

[18] 29 U.S.C. § 151 (1970).

than the statutory exclusive bargaining representative. The court, however, minimized the degree of the interference with the collective bargaining process, reasoning that the minority group had consulted with the union and had temporarily gone along with the contract grievance-arbitration process.[19] The court concluded that such limited interference with NLRA policies was outweighed by the benefit of incorporating employees rights protected by Title VII of the Civil Rights Act[20]—rights to be free of employer racial discrimination and to "oppose" it—into section 7 NLRA rights to engage in concerted activities. The court reasoned that the explicit statutory Title VII rights to be free from employer racial discrimination should not go unprotected by the NLRA,[21] where both the union and the minority group employees seek the elimination of the racial discrimination and differ only as to the proper remedial means.

In considering both the needs of the NLRA-promoted collective bargaining process and the needs of minority group employees, it appears that the court of appeals may be in error. The court underestimates the disruption that its decision will impose upon the collective bargaining process; and also incorrectly seeks to intertwine the Title VII statutory scheme, protecting rights of individual employees, with the NLRA statutory scheme that seeks primarily to protect collective rights of employees.[22]

The *Emporium* decision encourages employees to act independently of the collective bargaining process. Although the decision is limited to protection for minority activities relating to racial discrimination, the court's reasoning would logically lead to protection of extra-union activities relating to ethnic and sex discrimination. Such protection will not only decrease the prestige of the exclusive bargaining representative and thus weaken its power during bargaining with the employer, but it will also burden the employer in a way not contemplated by the NLRA. By requiring the employer to tolerate activities aimed at inducing separate bargaining, in contravention of the collective bargaining agreement, the decision would logically seem to require that the employer bargain separately with the minority over racial issues. However, section 9(a) of the NLRA[23] limits the employer's bargaining duty to negotiations with the exclusive bargaining representative. Indeed, employers have been held to violate their section 8(a)(5) duty to bargain where they

[19] 485 F.2d at 929, 83 L.R.R.M. at 2746-47.
[20] 42 U.S.C. § 2000e-3(a) (1970).
[21] 485 F.2d at 927, 83 L.R.R.M. at 2745.
[22] See J.I. Case Co. v. NLRB, 321 U.S. 332, 336-39 (1944).
[23] 29 U.S.C. § 9(a) (1970).

bargain with someone other than the statutory bargaining representative of the employees.[24]

Since the incorporation of the Title VII right to be free from employer racial discrimination into section 7 would frustrate NLRA collective bargaining policy, that court-initiated incorporation is unjustified. Section 7 does not in itself protect employees from employer race or sex discrimination; but merely prohibits such employer discrimination as would operate to discourage employees to collectivize and form or maintain an effective union.[25] In *Jubilee Manufacturing Co.*,[26] a 1972-1973 Survey year case, the Board refused to establish a rule that sex discrimination per se violates section 7 rights, reasoning that in certain cases such discrimination will not discourage the employees' exercise of the NLRA-protected right to engage in concerted activities. The Board in *Jubilee* perceived the NLRA as a statutory scheme protecting the right of employees to engage in concerted activities as the means of promoting the process of collective bargaining. The Board saw invidious discrimination as proscribed by the NLRA only where the evidence showed that it discouraged employees from collectivizing and engaging in concerted activities.

The distinction between the Title VII and the NLRA statutory schemes was underscored recently by the Supreme Court in *Alexander v. Gardner-Denver Co.*[27] There, the Court held that an individual employee's Title VII claim against the employer is not barred by a prior adverse arbitration decision made pursuant to the grievance-arbitration of the collective bargaining contract.[28] The Court reasoned that the Title VII statutory protection of employees from invidious employer discrimination should not be impeded by allowing decisions made as a result of the NLRA collective bargaining process to foreclose the enforcement of explicit Title VII rights.[29] *Alexander* indicates that adherence by the minority to the collective bargaining process will not extinguish their Title VII remedies for employer discrimination.

The *Alexander* Supreme Court decision, makes clear that although the racial minority may fail to achieve a remedy for the racial discrimination by adherence to the contractual-arbitration method and other collective bargaining procedures, the minority

[24] See, e.g., Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 683-85 (1944).

[25] Jubilee Mfg. Co., 202 N.L.R.B. No. 2, 82 L.R.R.M. 1482, 1484-85 (1973). See Comment, 1972-1973 Annual Survey of Labor Relations Law, 14 B.C. Ind. & Com. L. Rev. 1173, 1221-24 (1973).

[26] 202 N.L.R.B. No. 2, 82 L.R.R.M. 1482 (1973).

[27] Alexander v. Gardner-Denver Co., — U.S. —, 94 S. Ct. 1011, 7 FEP Cases 81 (1974).

[28] 94 S. Ct. at 1019, 7 FEP Cases at 86.

[29] Id.

retains the alternative of using Title VII methods to protect its Title VII rights. Thus, there is little justification for allowing employees to enforce Title VII rights by attempting to force extra-union bargaining upon the employer, especially where that method of protection of Title VII rights was not designated by Congress.

V. EMPLOYMENT DISCRIMINATION

A. *Introduction*

Since the enactment of Title VII of the Civil Rights Act of 1964,[1] extensive litigation by individuals seeking relief from discriminatory employment practices has produced a substantial body of law defining procedural requirements, substantive rights and available remedies applicable to employment discrimination cases. However, courts in recent years also have found jurisdiction to remedy discriminatory employment practices under the Civil Rights Act of 1866,[2] the Due Process and Equal Protection Clauses of the Fourteenth Amendment, the Fifth Amendment, and the Civil Rights Act of 1871,[3] as well as under Title VII. Resort to these additional sources of jurisdiction was necessitated by the fact that, before 1972, Title VII was not available to remedy discriminatory practices in public employment cases. Prior to the adoption of the Equal Employment Opportunity Act of 1972,[4] which amended Title VII in several significant respects,[5] state and local governments were not "employers" within the coverage of Title VII.[6] Although public employers are now covered by Title VII, most public employment discrimination cases today are causes of action which accrued prior to the 1972 amendments. Hence, the full impact of

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[1] 42 U.S.C. §§ 2000e et seq. (1970), as amended Pub. L. No. 92-261, 86 Stat. 103 (1972).

[2] Act of April 9, 1866, ch. 31, § 1, 14 Stat. 27, reenacted by § 18 of the Enforcement Act of 1870, Act of May 31, 1870, ch. 114, § 18, 16 Stat. 140, 144, now codified in 42 U.S.C. § 1981 (1970). Section 1981 provides in part:

> All persons within the jurisdiction of the United States shall have the same right in every State . . . to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings . . . as is enjoyed by white persons . . . .

[3] Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13, now codified in 42 U.S.C. § 1983 (1970). That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceedings for redress.

[4] 86 Stat. 103 (1972).

[5] See Comment, 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1366 (1972).

[6] 42 U.S.C. § 2000e (1970), as amended, 42 U.S.C. § 2000e (Supp. II, 1972).

that change has not yet been felt.[7] Consequently, Title VII primarily has served, concurrently with the Civil Rights Act of 1866 (hereinafter section 1981), as a vehicle for attacking employment discrimination by private employers. It has been held that a plaintiff alleging discrimination by a non-governmental employer may bring suit under section 1981 without complying with Title VII procedural requirements.[8] Therefore, courts have taken jurisdiction over private employer discrimination cases under both section 1981 and Title VII. In the near future, Title VII should provide a useful source of relief in cases involving discriminatory employment practices by state and local governments.[9]

Title VII (the Act) makes it an unlawful employment practice for an employer or a union to discriminate against applicants and employees or members on the basis of race, color, religion, sex, or national origin.[10] The Act prohibits discrimination in hiring, admission to membership, terms and conditions of employment, referrals for employment, and in extending employment opportunities.[11] Title VII also makes it an unlawful employment practice for a labor union to attempt to cause an employer to discriminate in violation of the Act.[12] Additionally, Title VII prohibits employer discrimination against an employee for asserting Title VII rights or participating in

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[7] Most Title VII cases which have reached the federal courts of appeals as of this writing were initiated prior to the enactment of the Equal Employment Opportunity Act. The 1972 Act has generally not been applied retroactively. See Mosely v. United States, 6 FEP Cases 462 (S.D. Cal. 1973); New Orleans Pub. Serv., Inc. v. Brown, 369 F. Supp. 702, 709, 6 FEP Cases 1317, 1322 (E.D. La. 1974). But see Pointer v. Sampson, 6 FEP Cases 9 (D.D.C. 1973).

[8] Young v. International Tel. and Tel. Co., 438 F.2d 757, 763, 3 FEP Cases 146, 151 (3d Cir. 1971); but cf., Waters v. Wisconsin Steel Works of Int'l Harvester Co., 427 F.2d 476, 481, 2 FEP Cases 574, 577 (7th Cir.), cert. denied sub. nom., International Harvester Co. v. Waters, 400 U.S. 911 (1970). For a discussion of these cases and the question of whether an attempt to comply with Title VII conciliation proceedings is required prior to initiation of a section 1981 suit, see Comment, 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1350 (1972).

[9] However, there are built-in delays in the Title VII machinery which might discourage aggrieved individuals from utilizing the Civil Rights Act of 1964 remedies and cause them to rely on section 1983 when their constitutional rights have been violated through state action. Where an allegedly unlawful employment practice is prohibited by state or local law and an enforcement mechanism exists, the plaintiff must await the termination of such enforcement proceedings or 60 days before filing a charge with the Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000e-5(c) (Supp. II, 1972). The EEOC now has power to initiate a civil suit for violation of Title VII, 42 U.S.C. § 2000e-5(f) (Supp. II, 1972), amending 42 U.S.C. § 2000e-5(f) (1970), but before initiating a civil action, the EEOC must attempt to obtain voluntary compliance for 30 days. 42 U.S.C. § 2000e-5(f)(1) (Supp. II, 1972). If the EEOC does not file a civil action or determines that reasonable cause does not exist to believe a Title VII violation has occurred, it must notify the aggrieved person, who then has 90 days in which to bring suit. The courts are required to assign such cases for early hearings and to expedite them. 42 U.S.C. §§ 2000e-5(f)(1), (2) (Supp. II, 1972).

[10] 42 U.S.C. § 2000e-2 (Supp. II, 1972).

[11] 42 U.S.C. § 2000e-2 (Supp. II, 1972).

[12] 42 U.S.C. § 2000e-2 (Supp. II, 1972).

a Title VII proceeding and makes it unlawful to cause to be published a notice relating to employment which indicates a preference or limitation based on race, color, religion, sex, or national origin.[13] Exceptions are made for classifications based on religion, sex or national origin, but not upon race or color, which are justified as "bona fide occupational qualification[s] reasonably necessary to the normal operation of that particular business or enterprise."[14] Thus, Title VII permits discrimination on the basis of factors other than race or color if justified as a bona fide occupational qualification. Title VII also permits an employer "to give and act upon the results of a professionally developed ability test," regardless of discriminatory impact, provided that the test is not designed or administered with discriminatory intent.[15] An employee must file charges within 180 days of the occurrence of an alleged unlawful employment practice, unless compliance with state or local proceedings is necessary, in which case the statute of limitations is 300 days.[16]

The Equal Employment Opportunity Commission (hereinafter EEOC) has general authority to implement Title VII,[17] with the exception of cases involving federal government agencies and departments under section 717.[18] The EEOC has power to investigate complaints, to seek voluntary compliance with Title VII and to initiate civil actions on behalf of aggrieved persons under section

[13] 42 U.S.C. § 2000e-3 (Supp. II, 1972).

[14] 42 U.S.C. § 2000e-2(e) (1970).

[15] 42 U.S.C. § 2000e-2(h) (1970).

[16] 42 U.S.C. § 2000e-5(e) (Supp. II, 1972).

[17] 42 U.S.C. § 2000e-5 (Supp. II, 1972).

[18] The Equal Employment Opportunity Act of 1972 adds a separate section extending coverage of Title VII to the federal government to a limited extent. 42 U.S.C. § 2000e-16 (Supp. II, 1972). Title VII now provides that "all personnel actions affecting employees or applicants for employment" in a federal government department or agency "shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a) (Supp. II, 1972). However, enforcement authority of § 717 is vested in the Civil Service Commission rather than in the EEOC and, unlike the EEOC, the Civil Service Commission is given adjudicatory powers under the Act. 42 U.S.C. § 2000e-16(b) (Supp. II, 1972). If the Civil Service Commission gives notice of adverse final action to an individual, such person may file a private civil suit under § 706 of Title VII of the Civil Rights Act of 1964 within thirty days, and if the agency fails to take final action within 180 days, the individual may institute a civil action. 42 U.S.C. § 2000e-16 (Supp. II, 1972).

Although there has been litigation under § 717, the issues which have arisen have been primarily procedural. See, e.g., Thompson v. Department of Justice, 7 FEP Cases 347 (N.D. Cal. 1974) (failure to request an administrative hearing following rejection of a claim of racially motivated discharge was a waiver of the right to trial de novo under the circumstances and the adverse administrative record entitled the agency to summary judgment); Jackson v. United States Civil Serv. Comm'n, 7 FEP Cases 575, 576-78 (S.D. Tex. 1973) (amendments apply retroactively where a claim was pending at the time of enactment and plaintiff is entitled to trial de novo); Spencer v. Richardson, 7 FEP Cases 105 (D.D.C. 1973) (administrative hearing not a prerequisite where notice of final agency action has been received and the suit may be litigated in the same fashion as any other Title VII action). Thus, the elements of a violation of § 717 have not yet been established by judicial decision.

706.[19] However, it is important to note that the EEOC does not have actual, primary enforcement powers under Title VII. "The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested in the federal courts."[20] Consequently, the EEOC must enforce its interpretations of Title VII indirectly—through litigation—when it cannot obtain voluntary compliance.

Section 713[21] gives the EEOC authority to issue "suitable procedural regulations to carry out the provisions" of Title VII. However, the Commission does not have power to issue substantive regulations with the force and effect of law.[22] Nevertheless, the EEOC has issued interpretative regulations under Title VII, denominated "guidelines," which the Supreme Court has stated are "entitled to great deference."[23] These guidelines are significant for two reasons. Section 713 makes good faith reliance on an EEOC regulation a valid defense to an action under Title VII.[24] Moreover, since the EEOC now has authority under Title VII to initiate a civil suit,[25] its guidelines serve employers, unions, and employment agencies with notice of when their employment practices may cause the EEOC to bring suit.

In general, the EEOC guidelines contain expansive interpretations of the substantive provisions of Title VII which extend the protections and prohibitions of the Act beyond the scope of coverage which Title VII has been given by many courts.[26] Since the EEOC Guidelines lack the force and effect of law, conflicting judicial constructions of Title VII supersede the EEOC regulations. Moreover, the EEOC, unlike many federal agencies, is not empowered to adjudicate issues arising under its enabling legislation. Both as a result of the not infrequent divergence of judicial interpretations of Title VII from those promulgated by the EEOC, and as a result of the fact that federal courts alone can adjudicate Title VII claims, the case law retains special significance in the domain of employment discrimination.

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[19] 42 U.S.C. § 2000e-5 (Supp. II, 1972). The EEOC has additional powers under other sections of Title VII. 42 U.S.C. §§ 2000e-4 to 2000e-12 (1970).

[20] Alexander v. Gardner-Denver Co., — U.S. —, 94 S. Ct. 1011, 1018, 7 FEP Cases 81, 84 (1974).

[21] 42 U.S.C. § 2000e-12 (1970).

[22] See Newspaper Publishers v. Alexander, 1 FEP Cases 703, 704 (D.C. Cir. 1969).

[23] Griggs v. Duke Power Co., 401 U.S. 424, 433, 3 FEP Cases 175, 178 (1971). These "guidelines" are officially printed at 29 C.F.R. 1601-07 (1973).

[24] 42 U.S.C. § 2000e-12 (1970).

[25] 42 U.S.C. § 2000e-5(f) (Supp. II, 1972).

[26] See, e.g., Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94, 6 FEP Cases 933, 936 (1973); Newspaper Publishers v. Alexander, 1 FEP Cases 703, 704 (D.C. Cir. 1969).

B. *Procedural Developments*

The Supreme Court's decision in *Alexander v. Gardner-Denver Co.*[1] represents the most significant procedural development of the Survey year relating to employment discrimination actions. The Court held that an employee may institute a Title VII suit following an adverse grievance-arbitration award, thus rejecting rules of preclusion and deferral.[2] As a consequence of *Alexander,* employees who receive inadequate union representation in grievance-arbitration proceedings are guaranteed the opportunity to vindicate their Title VII rights in court.

1. *Union Adequacy as a Class Representative:* Air Line Stewards and Stewardesses

Since the decision of the Supreme Court in *Steele v. Louisville & Nashville R.R.,*[3] it has been established that a union has a duty to protect all those it represents in collective bargaining and in contract administration, and may not advocate or agree to contractual provisions or tacitly acquiesce in employment practices which discriminate against the minority element in the bargaining unit on the basis of race.[4] Indeed, unions have been required by the NLRB to bargain for clauses explicitly prohibiting racially discriminatory employment practices.[5] Failure to take such affirmative action may constitute a violation of Title VII.[6] Such obligations are necessitated by holdings prohibiting the minority membership of a union from bargaining individually or choosing separate bargaining representatives, and establishing that the union may take actions which are unfavorable to some of its membership, subject only to the statutory duty of fair representation.[7]

In *Air Line Stewards and Stewardesses Association, Local 550 v. American Airlines, Inc.,*[8] the Seventh Circuit confronted the issue of whether the union's powers of exclusive representation, in the

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[1] — U.S. —, 94 S. Ct. 101, 7 FEP Cases 81 (1974). For a full discussion of *Alexander,* see text supra at page 1187.

[2] Id. at 1020-22, 7 FEP Cases at 86-87.

[3] 323 U.S. 192 (1944).

[4] Macklin v. Spector Freight Sys., Inc., 478 F.2d at 979, 989, 5 FEP Cases 995, 1001 (D.C. Cir. 1973).

[5] Id. at 989, 5 FEP Cases at 1000-01; Local 2, United Rubber Workers v. NLRB, 368 F.2d 12, 24-25, 63 L.R.R.M. 2395, 2404, (5th Cir. 1966), cert. denied, 389 U.S. 837, 66 L.R.R.M. 2306 (1967).

[6] 478 F.2d at 989, 5 FEP Cases at 1001.

[7] See Vaca v. Sipes, 386 U.S. 171, 190-91 (1967); Humphrey v. Moore, 375 U.S. 335, 349 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953); Steel v. Louisville & N.R.R., 323 U.S. 192, 200 (1944).

[8] 490 F.2d 636, 6 FEP Cases 1197 (7th Cir. 1973) cert. denied, — U.S. —, 7 FEP Cases 1160 (1974). See Note, 15 B.C. Ind. & Com. L. Rev. 1326 (1974).

absence of a breach of the duty of fair representation, pertain to the maintenance of Title VII class actions, as well as to contract negotiations and contract administration. Prior to 1970, the defendant airlines enforced a policy of permanently discharging stewardesses who became pregnant.[9] Consequently, the certified bargaining agent of the stewardesses, the Air Line Stewards and Stewardesses Association (ALSSA) and several individual former stewardesses, commenced an action against American, challenging the practice as an unlawful sex discrimination in violation of Title VII.[10] The complaint sought certification of a class, under Rule 23(b)(2) of the Federal Rules of Civil Procedure, composed of all present and former American stewardesses employed at any time since the effective date of Title VII[11] "who had been, desired to be, or would in the future desire to be, pregnant."[12] In 1970, ALSSA and the airlines entered collective bargaining agreements which prospectively eliminated the challenged discharge practice.[13] As a consequence of this agreement, the attorney for ALSSA conceded that the union could not fully represent the conflicting interests of both present and former stewardesses.[14] The interests of the two groups of stewardesses conflicted because the seniority of currently employed stewardesses would be adversely affected by reinstatement of former stewardesses with full seniority; this would affect trip assignments, which are governed by seniority.[15] Moreover, since the company refused to negotiate concerning back pay, the interests of present and former stewardesses clashed because litigation to obtain back pay would be costly to the union and its present membership.[16]

Subsequent to the employer's agreement to abandon the discharge policy, the union, without consulting the individual plaintiffs,[17] agreed to a settlement of the Title VII action. The terms of the settlement required discharged stewardesses, who desired re-employment, to notify the airline. This would place them on a preferential hiring list.[18] Re-employed stewardesses would start with at least full seniority as of the date of termination; however, no

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[9] 490 F.2d at 637, 6 FEP Cases at 1198.
[10] Id.
[11] July 2, 1965. 42 U.S.C. § 2000e-15 (1970).
[12] 490 F.2d at 637, 6 FEP Cases at 1198.
[13] Id.
[14] Id. at 640, 6 FEP Cases at 1200.
[15] Id.
[16] Id.
[17] Id. at 638, 6 FEP Cases at 1198.
[18] Id.

provisions were made for back pay.[19] Failure to notify the airline would relieve the airline of all liability.[20]

After the proposed settlement, the trial court ordered that the action be maintained as a class action pursuant to Rule 23(c)(1),[21] but it did not expressly consider the requirements of Rule 23(a):[22] that the size of the class be such that joinder of all members would be impracticable; that there exist questions of law or fact common to the class; that "the claims or defenses of the representative parties are typical" of the claims or defenses of the class; and that the representative "will fairly and adequately protect the interests of the class." Since the trial court did not order a notice required by Rule 23(c)(2) in class actions maintained under Rule 23(b)(3), it would appear that the court applied Rule 23(b)(2).[23] The use of 23(b)(2) had the consequence of binding all members of the class to the judgment approving the settlement, since only 23(c)(3) and the notice issued pursuant to 23(c)(2) permit a member to opt out of the class.

Former stewardesses, who were understandably dissatisfied with the settlement because it did not entitle them to back pay or back seniority, appealed. In reversing the judgment of the trial court, the Seventh Circuit held that the class action brought by the discharged stewardesses must be maintained under Rule 23(b)(3), which applies where the court finds that common questions of law or fact predominate over questions affecting only individual members and that a class action is superior to other procedural devices.[24] The court concluded that Rule 23(b)(2) should apply to the class composed of currently employed stewardesses only.[25] Rule 23(b)(2) applies where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . ." The court reasoned that 23(b)(2) applied to the class of presently employed stewardesses because they sought declaratory and injunctive relief from the discharge policy.[26] Addressing the issue of whether the union satisfied the requirements of a class representative for the entire class of present stewardesses, the Seventh Circuit held that the adequacy of a union as a representative party in a class suit and its authority to

[19] Id.
[20] Id.
[21] Id.
[22] Fed. R. Civ. P. 23(a).
[23] 490 F.2d at 638-39, 6 FEP Cases at 1198-99.
[24] Id. at 643, 6 FEP Cases at 1202.
[25] Id.
[26] Id.

compromise rights of its members which do not arise out of collective bargaining agreements, "are to be tested and judged in the ordinary way."[27] Under this test, the union was found to be an unsatisfactory representative of the class of former stewardesses.

Significantly, the court reasoned that "except for the area of collective bargaining and its necessary incidents, the union has no unique authority to compromise the rights of its members."[28] Thus, the Seventh Circuit rejected the contention that the union's role as an exclusive bargaining agent gave it the power, subject only to the duty of fair representation, to accommodate and adjust the Title VII rights of its members. Rather, *Air Line Stewards* requires that a union fulfill the Rule 23(a) criteria before it may maintain suit as a class representative in Title VII actions. Consequently, a union may not represent its members and compromise their rights in Title VII actions unless: (1) the claims or defenses of the union are typical of those of the class; and (2) the union will fairly and adequately protect the interests of the class.

It is submitted that *Air Line Stewards* correctly limited union powers of exclusive representation to collective bargaining and contractual administration.[29] Title VII rights are individual, statutory rights which exist independently of the collective bargaining agreement. The union admittedly was *not* an adequate class representative under Rule 23(a) in *Air Line Stewards*. Moreover, in cases of employment discrimination, it would appear that the union would almost never be an adequate representative. The union itself, along with the employer, might be charged with a violation of the employee's Title VII rights.[30] Typically, in a Title VII action for discrimination on the basis of race, color, religion, sex, or national origin, aggrieved union members would only constitute a minority of the total union membership. As *Air Line Stewards* demonstrates, the interests of the majority of union members often conflict with those of the minority. Consequently, even if the union were not charged with engaging in or approving of, discriminatory practices, it is arguably unlikely that the union would "fairly and adequately protect the interests of the class" of grievants as required by Rule 23(a)(4).[31] Thus, if followed in other circuits, *Air Line Stewards* will

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[27] Id. at 642, 6 FEP Cases at 1201.

[28] Id.

[29] See Note, 15 B.C. Ind. & Com. L. Rev. 1326 (1974).

[30] See, e.g., Macklin v. Spector Freight, Inc. 478 F.2d 979, 5 FEP 994 (D.C. Cir. 1973).

[31] *Air Line Stewards* was followed in Chrapliway v. Uniroyal, Inc., — F. Supp. —, 7 FEP Cases 343 (N.D. Ind. 1974), where the court held that the class action brought by female employees for discrimination against past and present employees must be maintained under Rule 23(b)(3) rather than under 23(b)(2). 7 FEP Cases at 345. Furthermore the court held that Zahn v. International Paper Co., 414 U.S. 291 (1973), does not require that all members of

generally preclude union representation of a plaintiff-class in Title VII actions.

2. *Burden of Proof in Title VII Actions:* McDonnell Douglas

Title VII does not allow an employer to justify racially discriminatory employment practices under the "bona fide occupational qualification" exception of section 703(e),[32] which is limited to actions based on religion, sex, or national origin. Consequently, an employer charged with engaging in racial discrimination in violation of Title VII, must rely on the business necessity defense.[33] In *Griggs v. Duke Power Co.*,[34] the Supreme Court applied Title VII to superficially neutral employment practices. The challenged practices had a present discriminatory impact and also preserved the effects of past racial discrimination.

> The Act proscribes not only overt discrimination, but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited.[35]

The Court concluded in *Griggs* that the defendant company had failed to meet the test under the business necessity defense, since neither the high school degree requirement, nor the general intelligence test utilized by the company in making employment and promotion decisions, was "shown to bear a demonstrable relationship to successful performance of the jobs for which it was used."[36] Thus, while the Court stated that the test applicable to employment practices which are neutral on their face but discriminatory in operation,

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the plaintiff class meet jurisdictional requirements of filing a charge with the EEOC under Title VII. The court distinguished *Zahn*, which held that multiple plaintiffs with separate and distinct claims must each satisfy the jurisdictional amount requirement in a diversity case, on the grounds that Title VII suits are necessarily class actions, that such a requirement would abolish class suits under Title VII and consequently, would defeat the purpose of the Civil Rights Act of 1964, and that Title VII jurisdictional requirements are completely different. 7 FEP Cases at 346.

[32] 42 U.S.C. § 2000d-2(e) (1970).

[33] The business necessity defense was suggested by the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424, 431, 3 FEP Cases 175, 178 (1971). Subsequent cases developed the defense. See, e.g., United States v. Jacksonville Terminal, 451 F.2d 418, 450-51, 3 FEP Cases 862, 889 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662, 3 FEP Cases 589, 596 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d 791, 798, 3 FEP Cases 653, 657-58 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

[34] 401 U.S. 424, 3 FEP Cases 175 (1971).

[35] Id. at 431, 3 FEP Cases at 178.

[36] Id.

is that of "business necessity," *Griggs* apparently required the employer to show only a "demonstrable relationship" to successful job performance. However, the lower federal courts have applied a strict definition of the business necessity defense in cases involving racially discriminatory employment practices.[37] To establish the business necessity defense in a Title VII action, *employers* have been required to show that the challenged practice is *essential* to the safe and efficient operation of the business,[38] and that no less discriminatory, equally effective policy is reasonably available.[39]

In *McDonnell Douglas Corp. v. Green,*[40] the Supreme Court established rules governing "the order and allocation of proof in a private, non-class action challenging employment discrimination."[41] Significantly this survey year decision may represent a limited, implied modification of the business necessity defense in certain types of cases involving racial discrimination.[42] The respondent, a long-time civil rights activist and a former long-term employee of the company, was laid off in the course of a general reduction of petitioner's work force.[43] In a protest against the petitioner's allegedly discriminatory hiring practices, the respondent participated in a "stall-in" wherein he and other members of the Congress on Racial Equality "illegally stalled their cars on the main roads leading to the petitioner's plant for the purpose of blocking access to it at the time of the morning shift change."[44] Subsequently, the company advertised for qualified persons of the respondent's trade, and the respondent promptly applied for the position, but was rejected.[45] Green then filed charges with the EEOC against the company for violations of sections 703(a)(1)[46] and 704(a)[47] of the Civil Rights Act of 1964. The complaint alleged that the company had refused to hire Green because of his race and his civil rights activism.[48]

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[37] See, e.g., Head v. Timken Roller Bearing Co., 486 F.2d 870, 879, 6 FEP Cases 813, 819 (6th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791, 798, 3 FEP Cases 653, 657-58 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

[38] See Note, 47 S. Cal. L. Rev. 585, 604 (1974).

[39] See Robinson v. Lorillard Corp., 444 F.2d 791, 798, 3 FEP Cases 653, 657-58 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

[40] 411 U.S. 792 (1973).

[41] Id. at 800.

[42] See Note, 15 B.C. Ind. & Com. L. Rev. 654 (1974).

[43] Respondent protested that his discharge and petitioner's hiring practices were racially motivated, but he apparently did not file charges with the EEOC at that time. 411 U.S. at 794 n.2.

[44] Id. at 794. A "lock in" also occurred, but the evidence did not establish that respondent participated in chaining the door of one of the company buildings. Id.

[45] Id.

[46] 42 U.S.C. § 2000e-2(a)(1) (1970).

[47] 42 U.S.C. § 2000e-3(a) (1970).

[48] 411 U.S. at 796.

The EEOC did not find reasonable cause to believe that a violation of section 703(a)(1) had occurred; but it did find that the company's refusal to rehire the respondent, because of his involvement, constituted reasonable cause to believe that the company had violated section 704(a).[49] EEOC efforts at conciliation failed, and Green brought suit for violations of both sections of Title VII. Section 703 "generally prohibits racial discrimination in any employment decision" while section 704(a) "forbids discrimination against applicants or employees for attempting to protest or correct allegedly discriminatory conditions of employment."[50] The trial court dismissed the section 703 claim because the EEOC had not found reasonable cause to believe that a violation of that section had occurred,[51] but the Eighth Circuit reversed and remanded for consideration of the section 703 claim.[52] Both courts concluded that section 704(a) did not protect illegal protest activities engaged in by employees.[53]

The Supreme Court agreed with the Eighth Circuit's decision that an individual grievant's suit is not barred by the failure of the EEOC to find reasonable cause to believe that a violation of Title VII has occurred.[54] The Court then proceeded to prescribe rules governing "the order and allocation of proof in a private, non-class action challenging employment discrimination."[55]

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and, (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[56]

On the basis of these rules, the Court concluded that the respondent had shown a prima facie case.[57] "The burden then must shift to the employer to articulate some legitimate, nondiscirminatory reason for respondent's rejection."[58] Respondent's participation in the illegal

[49] Id. at 797.
[50] Id.
[51] 2 FEP Cases 997 (D.C. Mo. 1970).
[52] 463 F.2d 337, 343, 4 FEP Cases 577, 582 (8th Cir. 1972).
[53] 411 U.S. at 797.
[54] Id.
[55] Id. at 800.
[56] Id. at 802.
[57] Id. at 802-03.
[58] Id.

"stall-in" was found sufficient to satisfy this burden of proof; but the Court expressly declined to establish guidelines defining what "legitimate, nondiscriminatory reason[s] "justify an employer's rejection of an applicant.[59] Finally, the Court held that the employee must be afforded a fair opportunity to show that the employer's stated reason for its refusal to hire was in fact pretextual and accordingly remanded the case to the trial court.[60]

In attempting to distinguish *Griggs*, the Court in *McDonnell Douglas* noted that *Griggs* involved employment practices which resulted in discrimination on the basis of characteristics of the grievants which were produced by forces beyond the grievants' control.[61] On the other hand, in *McDonnell Douglas*, Green was excluded because of his own voluntary acts, not on the basis of a sweeping disqualification of all persons with criminal records, which would operate without regard to an applicant's qualifications.[62] Thus the implication was raised that such a sweeping disqualification would fall within the prohibitions of *Griggs*, though the actions being challenged did not. "Petitioner assertedly rejected respondent for unlawful conduct against it and in the absence of proof of pretextual or discriminatory application of such a reason, this cannot be thought the kind of 'artificial arbitrary, and unnecessary barrier to employment' which the Court [in *Griggs*] found to be the intention of Congress to remove."[63] Thus, the Court in *McDonnell Douglas* found *Griggs* factually distinguishable and applied new requirements for an employer defense to a private, single plaintiff action for violation of Title VII. However, the implications of *McDonnell Douglas* are unclear. The Court failed to define the requirements of the employer's burden of proof under the "legitimate nondiscriminatory reason" defense, and did not establish a standard to be used in judging when an employee has overcome his employer's defense by a showing of pretextuality.[64]

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[59] Id.

[60] Id. at 804.

Other evidence that may be relevant to any showing of pretextuality includes facts as to the petitioner's treatment of respondent during his prior term of employment, petitioner's reaction, if any, to respondent's legitimate civil rights activities, and petitioner's general policy and practice with respect to minority employment.

Id.

[61] Id. at 804-05.

[62] Id.

[63] Id.

[64] Although the Supreme Court noted that the issue before it concerned the burden of proof in a "private, non-class action" employment discrimination case, at least one court has applied the *McDonnell Douglas* rules in a class suit to the individual plaintiffs' charges of discrimination. Henderson v. First Nat'l Bank, 360 F. Supp. 531, 6 FEP Cases 859 (M.D. Ala. 1973). The plaintiffs in *Henderson* challenged the bank's hiring practices, but the court held that they had failed to meet their burden under *McDonnell Douglas* since none of the

Recent decisions have provided some clarification of the *McDonnell Douglas* rules regarding the order and allocation of proof in Title VII cases.[65] In *Taylor v. Safeway Stores,*[66] the court, after finding that a prima facie case of discriminatory discharge had been established, applied the rules regarding both the employer's burden in rebutting a prima facie case and the employee's burden in overcoming that rebuttal. In *McDonnell Douglas,* the Supreme Court held that, once a plaintiff has made a prima facie case of employment discrimination, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason . . ." for the challenged employment practice.[67] Then the employee must be given an opportunity to show that the "stated reason . . . was in fact pretextual."[68] In *Taylor,* which involved an allegedly discriminatory discharge, the plaintiff established a prima facie case by showing: "(1) that the plaintiff is a black man, (2) that he was discharged, and (3) that the person who discharged him was predisposed to discriminate against blacks."[69] Because of the factual variation presented in *Taylor,* the court could not apply the Supreme Court's four-part test of a prima-facie showing in discriminatory hiring practice cases.[70] Nonetheless, the court in *Taylor* attempted to develop an equivalent standard and proceeded to apply the additional *McDonnell Douglas* rules: the employer's burden of rebuttal of a prima facie case by advancing a legitimate, nondiscriminatory reason and the employee's burden of overcoming that rebuttal by a showing of pretextuality.

Concluding that *McDonnell Douglas* placed upon the employer the "burden of going forward, of advancing" a legitimate, nondiscriminatory reason for its challenged employment action, the court in *Taylor* held that the defendant discharged this burden by introducing evidence that the company records showed, on their face, that the plaintiff's productivity had been substandard.[71] *Taylor* does not require the defendant company to carry the burden of persuasion by proving the existence of a legitimate, nondiscriminatory

class members was shown to be both available and qualified for employment in the position sought. Id. at 546-47, 6 FEP Cases at 871. It would appear that no court during the Survey year applied *McDonnell Douglas* in a public employment case. Should the courts utilize the *McDonnell Douglas* rules in class actions and public employment cases, *McDonnell Douglas* will have tremendous significance as a result of its apparent relaxation of the employer's burden of proof in establishing a defense to a charge of employment discrimination.

[65] See Taylor v. Safeway Stores, Inc., 365 F. Supp. 468, 6 FEP Cases 556 (D. Colo. 1973); Henderson v. First Nat'l Bank, 360 F. Supp. 536, 6 FEP Cases 859 (M.D. Ala. 1973).

[66] 365 F. Supp. 468, 6 FEP Cases 556 (D. Colo. 1973).

[67] 411 U.S. at 802.

[68] Id.

[69] 365 F. Supp. at 472, 6 FEP Cases at 558.

[70] See text at note 25 supra.

[71] Id. at 472-73, 6 FEP Cases at 559.

reason for its conduct. Rather, the court concluded that *McDonnell Douglas* required the employer to meet the lesser burden of going forward with the evidence in rebutting the plaintiff's prima facie case. Although the defendant discharged this burden, the court in *Taylor* held that the reason advanced by the defendant employer, poor work performance, was "merely a pretext" for discriminatorily firing the plaintiff; thus, a violation of Title VII was found.[72] This holding rested upon findings that the person in charge of keeping the employment records was prejudiced against blacks; that the defendant company knew this; that the records were unreliable; and that the company readily acquiesced in the discharge decision.[73] It would appear that the rationale of *Taylor* would support a rule, in Title VII non-class actions, that a showing of pretextuality overcoming the employer's rebuttal of the prima facie case of employment discrimination is made, within the *McDonnell Douglas* rule, where the employee shows that the challenged action was taken by a racially prejudiced individual on the basis of criteria known or intended by the employer to be "fraudulent, inaccurate or otherwise unreliable."[74]

While *Griggs* placed upon the employer the burden of showing that an employment practice is demonstrably related to successful job performance under the test of business necessity, *McDonnell Douglas,* as interpreted in *Taylor,* would, in effect, place the burden of showing that the employment practice was *not* job related, upon the *employee* in private, Title VII non-class actions. The defendant employer would only be required to "advance sufficient evidence of a legitimate, nondiscriminatory reason" for the challenged conduct in order to satisfy the burden of going forward, while the plaintiff employee would have the ultimate burden of proving that the employer's stated reason was merely a pretext for prohibited discrimination. *Taylor* indicates that application of *McDonnell Douglas* in a broad range of Title VII cases would sharply limit *Griggs* by relaxing the employer's burden of proof in establishing a defense, and by shifting the ultimate burden of proof in employment discrimination cases to the plaintiff employee. However, it is submitted that the courts will limit the application of the *McDonnell Douglas* burden of proof rules to factually analagous cases instituted by individual plaintiffs seeking redress for individual discriminatory employment actions.

Recent employment discrimination decisions indicate that the courts are likely to determine the applicability of *McDonnell Doug-*

[72] Id.
[73] Id.
[74] Id. at 473-74, 6 FEP Cases at 559-60.

las on the basis of the circumstances presented in each case.[75] The *Taylor* court unquestioningly applied the *McDonnell Douglas* rules to the issues presented by the plaintiff in his individual claim of racial discrimination, without mention of the arguably limited nature of the *McDonnell Douglas* holding. At least one court has disregarded the new burden of proof rules and required the employer to meet the established criteria of the business necessity defense in a clearly dissimilar factual situation.[76] However, the decision of the Eighth Circuit in *Wallace v. Debron Corp.*,[77] where the court avoided applying the new burden of proof rules by expressly finding *McDonnell Douglas* factually distinguishable, most perceptibly manifests the probable judicial approach to the application of the *McDonnell Douglas* rules.

In *Wallace,* the plaintiff, a black man, was garnished twice within twelve months, in violation of a company rule, and was consequently discharged.[78] Noting that only one other employee, a white man, had been discharged pursuant to this company rule, the trial court concluded that *McDonnell Douglas* rather than *Griggs* controlled because *Wallace* did not involve employment practices having discriminatory impact as a result of forces beyond the control of the aggrieved class.[79] Plaintiff's cause of action was dismissed on the grounds that the company rule was sufficiently job-related to satisfy the employer's burden of advancing a legitimate nondiscriminatory reason for its action.[80]

Finding that *Griggs* controlled, the Eighth Circuit held that the trial court erred in granting the defendant's motion for summary judgment.[81] Noting that the defendant employer conceded "that its racially neutral garnishment policy subjects a disproportionate number of blacks to discharge from employment,"[82] the circuit court in *Wallace* reasoned that *Griggs* required the removal of all artificial, arbitrary, and unnecessary racial barriers to employment, regardless of the absence of a showing of historical discrimination.[83] *McDonnell Douglas* was distinguished on three grounds: (1) the employer in

[75] However, one court applied the *McDonnell Douglas* rules in a case presenting issues similar to those before the Court in *Griggs,* in contrast to the apparent trend of decisions. Henderson v. First Nat'l Bank, 360 F. Supp. 531, 6 FEP Cases 859 (M.D. Ala. 1973). See note 33 supra.

[76] Head v. Timken Roller Bearing Co., 486 F.2d 870, 879, 6 FEP Cases 813, 817 (6th Cir. 1973) (Class action for relief from discriminatory employment practices with a classwide impact).

[77] — F.2d —, 7 FEP Cases 595 (8th Cir. 1974).

[78] 363 F. Supp. 837, 6 FEP Cases 316 (E.D. Mo. 1973).

[79] Id. at 837-38, 6 FEP Cases at 318.

[80] Id. at 838, 6 FEP Cases at 318.

[81] 7 FEP Cases at 598.

[82] Id. at 596.

[83] Id. at 596-97.

Wallace conceded that the challenged practice would have a disproportionately adverse effect on blacks; (2) the record contained no evidence that the employee's conduct which prompted the discharge in *Wallace*, was voluntary; and (3) *McDonnell Douglas* did not involve an employment practice neutral on its face with a discriminatory impact on blacks.[84] Consequently, the court concluded that the defendant had to prove the facts necessary to establish the business necessity defense.[85]

Wallace indicates that the courts will limit the application of *McDonnell Douglas* to factually similar cases. Thus, it would appear that the *McDonnell Douglas* burden of proof rules will not be applied in class suits or in Title VII actions involving allegedly discriminatory employment practices which have a class-wide impact. In such cases, courts will probably continue to require employers to satisfy the criteria of the strict business necessity test as it has evolved from *Griggs*. The fact that the holding of the Supreme Court in *McDonnell Douglas* was unanimous arguably lends support to the hypothesis that the Court intended that case to have a limited effect on *Griggs*. An implied overruling of a case as significant as *Griggs* has proven to be in the advancement of the goals of Title VII, would certainly have generated a strong dissent. Nonetheless, *McDonnell Douglas* may have a substantial impact upon individual plaintiff employment discrimination suits which involve allegations of individual, discriminatory employment actions. In such suits the employer's burden of proof in establishing a defense will be noticeably decreased, while the plaintiff employees will have the ultimate burden of proof.

C. *Sex Discrimination*

1. *Introduction*

Considerable public attention has focused upon the general problem of sex discrimination during recent years. The women's liberation movement and the proposed 27th Amendment to the United States Constitution[1] have generated a host of news reports and scholarly analyses. After passage by the House in 1971, and by the Senate in 1972, the drive for ratification of the Equal Rights Amendment by the necessary three fourths,[2] or thirty-eight, of the states, started promisingly but languished during the Survey year,

[84] Id. at 597.
[85] Id. at 598.

[1] The proposed 27th Amendment states that "[e]quality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex."
[2] U.S. Const. art. V.

leaving its fate uncertain at the time of this writing.[3] Although the movement for adoption of the Equal Rights Amendment appears to have lost momentum, the courts are developing substantial protection against sex discrimination in employment under both Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment.[4]

Title VII explicitly prohibits employment discrimination on account of sex unless such discrimination can be justified as a bona fide occupational qualification (hereinafter BFOQ). Section 703(a) of the Act provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[5]

The courts have noted the lack of legislative history which would provide guidance in the interpretation of the proscription against sex discrimination in employment contained in this section.[6] The statute has been construed as demonstrating Congressional intent to "provide equal access to the job market for both men and women"[7] and to preserve "equal occupational opportunities," such as "equal rights to available employment, equal pay for equal work, and equal working conditions."[8] The prohibition against employment dis-

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[3] Thirty-three states had ratified the Equal Rights Amendment as of February 1974. 60 Women Lawyer's J. 16 (1974). Eleven states are scheduled to consider or to reconsider the proposed amendment in 1974. Id. at 30. Some states are considering rescission of their ratification, as Nebraska has done. See Note, 49 N.D. Lawyer 657 (1974).

[4] See text at notes 30-66 infra.

[5] 42 U.S.C. § 2000e-2(a) (1970).

[6] Diaz v. Pan Am. World Airways, Inc. 442 F.2d 385, 386, 3 FEP Cases 337 (5th Cir.), cert. denied, 404 U.S. 950 (1971). See Baker v. California Land Title Co., 394 F. Supp. 235, 237-38, 5 FEP Cases 329, 330 (C.D. Cal. 1972). The amendment adding sex discrimination to the list of unlawful employment practices in § 703(a) was adopted in the House with little pertinent debate only one day before passage of the Civil Rights Act of 1964. 442 F.2d at 386, 3 FEP Cases at 338. As a result, the House report accompanying Title VII states that the purpose of the Act is to eliminate "discrimination in employment based on race, color, religion, or national origin." H. Rep. No. 914, 88th Cong., 1st Sess. (1964), reprinted in 1964 U.S. Code. Cong. & Ad. News. 2401.

[7] 442 F.2d at 386, 3 FEP Cases at 338.

[8] 349 F. Supp. at 238.

crimination on account of sex now extends to state and local governments as a result of the amendment of section 701 contained in the Equal Employment Opportunities Act of 1972,[9] and to federal agencies under both Executive Order 11478,[10] and new section 717.[11] The EEOC takes the position that "[t]he principle of nondiscrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group."[12]

While discrimination in employment on the basis of sex is forbidden under Title VII, this proscription is qualified by the BFOQ exception. Section 703(e) permits different treatment of an applicant or an employee

> on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .[13]

In recognition of the general goal of Title VII—promotion of equal opportunities in employment—courts have narrowly construed this provision.[14] The EEOC guidelines provide that the section 703 BFOQ exception should be interpreted narrowly,[15] and the restrictive language of the section 703(e) exception, in contrast to the broad prohibitions against employment discrimination contained in the whole of Title VII, seems to provide a sound basis for the EEOC guidelines.[16]

Among the EEOC regulations pertaining to sex discrimination are guidelines which bear directly on two significant areas of controversy which have come before the courts during the Survey year: grooming codes and mandatory maternity leave regulations. The Commission has adopted the view that "the refusal to hire an individual based on stereotyped characterizations of the sexes" does not fall within the bona fide occupational qualifications exception.[17]

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[9] Equal Employment Opportunities Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, amending 42 U.S.C. §§ 2000e et seq. (1970).

[10] 34 Fed. Reg. 12985 (1969).

[11] 42 U.S.C. § 2000e-16 (Supp. II, 1972). The federal government was not made an employer within the meaning of § 701. 42 U.S.C. § 2000e (Supp. II, 1972).

[12] 29 C.F.R. § 1601 (1973).

[13] 42 U.S.C. § 2000e-2(e) (1970).

[14] See Diaz v. Pan Am. World Airways, 442 F.2d 385, 5 FEP Cases 13 (5th Cir.), cert. denied, 404 U.S. 950 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 1 FEP Cases 656, 70 L.R.R.M. 2843 (5th Cir. 1969).

[15] 29 C.F.R. § 1604.2 (1973).

[16] See cases cited in note 14 supra.

[17] 29 C.F.R. § 1604.2 (1973).

Additionally, the EEOC guidelines provide that a mandatory leave or termination policy for pregnant women presumptively violates Title VII.[18] These regulations are entitled to great deference by the courts, since they have been adopted by the agency charged with the initial implementation of the Act.[19] However, the guidelines have generally not been dispositive of the cases which have arisen because the EEOC was only given authority to issue procedural regulations by its enabling legislation.[20] Additionally, in many of the significant cases the employers involved were state or local governments, which, prior to 1972, were specifically exempted from the Act, and consequently from the EEOC guidelines.

The exemption of state and local governments from coverage under Title VII before 1972 necessitated the development of constitutional theories of relief in cases of employment discrimination based upon sex. Aggrieved persons have contended that such discrimination constitutes a denial of equal protection under the Fourteenth Amendment.[21] Consequently, the standard of review applied by the courts in these cases has largely determined the results reached. The traditional "rational basis" test utilized by the Supreme Court in controversies involving charges of sex discrimination required only that the classification adopted by the state or local government have some basis in reason.[22]

The rational basis test was apparently modified by the Court in *Reed v. Reed,*[23] in which Chief Justice Burger, speaking for a unanimous seven-man Court purported to apply the rule requiring "a rational relationship to a state objective."[24] However, he also stated that "[a] classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."[25] The Court held that though the goal of administrative efficiency was a legitimate one in *Reed,* the relationship between the classification and the objective was insufficient, and the classification violated the Equal Protection Clause of the 14th Amendment.[26] The requirement that legislation which discriminates on the basis of sex bear a "fair and substantial relation" to its object amounted to a more stringent test of permissibility than that imposed under the traditional standard.

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[18] 29 C.F.R. § 1604.10 (1973).
[19] Griggs v. Duke Power Co. 401 U.S. 424, 434 (1971).
[20] 42 U.S.C. § 2000e-12 (1970).
[21] See text at notes 30-66 infra.
[22] See Goesart v. Cleary 335 U.S. 464, 467 (1948).
[23] 404 U.S. 71 (1971).
[24] Id. at 76.
[25] Id.
[26] Id.

In *Frontiero v. Richardson,*[27] seven members of the Court, in two separate opinions, determined that a sex classification imposed by federal statutes amounted to discrimination in violation of the Due Process Clause of the Fifth Amendment. Justice Brennan, announcing the judgment of the Court in an opinion joined by Justices Douglas, White and Marshall, concluded that classifications based upon sex, like those based upon race, alienage, or national origin, are inherently suspect, and must therefore be subject to strict judicial scrutiny.[28] However, since the four concurring justices declined to adopt this approach, [29] the test to be applied by the courts in determining the constitutionality of classifications based upon sex remains the rational basis test as modified by the Supreme Court in *Reed.*

2. *Mandatory Maternity Leave Regulations:* La Fleur

Recent civil rights litigation has included a number of constitutional challenges of mandatory maternity leave regulations for teachers in public school systems. Several such cases reached the United States courts of appeals, and a division on this issue among the courts arose.[30] The regulations generally required teachers to give the school system early notice of their pregnancy. The teachers were required to terminate employment several months before the expected date of birth and they could not return to work until at least one semester after giving birth to a child. The rules often did not guarantee re-employment and return to work was typically conditioned upon submission of a physician's certificate of fitness. The Second Circuit in *Green v. Waterford Board of Education,*[31] and the Tenth Circuit in *Buckley v. Coyle Public School System*[32] held that such regulations violate the Equal Protection Clause, thus joining with the Sixth Circuit in condemning such rules, while the Fourth Circuit alone had adopted the contrary position.[33]

In *Green,* the court reasoned that the Supreme Court had not yet added sex to the category of inherently suspect classifications

[27] 411 U.S. 677 (1973).

[28] Id.

[29] Id. at 691. Justices Powell, Burger and Blackmun felt that the Court should not pre-empt a determination of the status of classifications based upon sex, but should defer to the judgment of the people as expressed through their state legislatures in decisions on the ratification of the 27th Amendment.

[30] Cohen v. Chesterfield County School Bd., 474 F.2d 395, 5 FEP Cases 341 (4th Cir. 1973), rev'd — U.S. —, 94 S. Ct. 791 (1974) (mandatory maternity leave rules for public school teachers held not violative of teachers' constitutional rights); contra LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184, 4 FEP Cases 1070 (6th Cir. 1972), aff'd, — U.S. —, 94 S. Ct. 791 (1974) (maternity leave regulations violate the 14th amendment).

[31] 473 F.2d 629, 637, 5 FEP Cases 443, 449 (2d Cir. 1973).

[32] 476 F.2d 92, 96, 5 FEP Cases 773, 775-76 (10th Cir. 1973).

[33] See note 30 supra.

which includes race, nationality and alienage, but that the decision in *Reed* modified the traditional rational basis test as it applied to classifications based upon sex, imposing a somewhat stricter standard.[34] The maternity leave regulations did not pass scrutiny under the *Reed* standard: the regulations lacked the requisite relation to the legislative objectives of protecting the safety and health of the teacher and the unborn child, avoiding classroom distraction, assuring continuity of instruction and promoting administrative convenience.[35]

Reasoning that the possibility that pregnancy may be a voluntary status is irrelevant, the Tenth Circuit in *Buckley* condemned the regulation in question because it penalized the female school teacher for being a woman.[36] The classification imposed by the regulation would be susceptible to a charge that it discriminated arbitrarily against womanhood and invaded the plaintiff's privacy.[37] Therefore, the Tenth Circuit held that "[t]he state must demonstrate a compelling interest in order to justify its policy because the interest involved is a fundamental one in that (1) it concerns the acknowledged right of the plaintiff to bear children and (2) it demands that a school teacher select either employment or pregnancy."[38] Implicit in the decision in *Buckley* is the conclusion that the classification of pregnant teachers impinged upon a fundamental right and hence could only be sustained upon a showing of a compelling state interest. Classifications based upon sex were not held to be inherently suspect.

Although the *Buckley* rationale would appear to be supported by prior case law under the Equal Protection Clause,[39] the issue of the constitutionality of mandatory maternity leave regulations was ultimately determined under the Due Process Clause. Resolving the conflict among the federal courts on the issue of whether mandatory maternity leave regulations for public school teachers are constitutionally permissible, the Supreme Court, in *LaFleur v. Cleveland Board of Education*,[40] held that such regulations violate the Due Process Clause of the Fourteenth Amendment if they contain overly restrictive, arbitrary cut-off dates.[41] Mandatory maternity leave

[34] 473 F.2d at 632-33, 5 FEP Cases at 444-45.

[35] Id. at 634-36, 5 FEP Cases at 447-48.

[36] 476 F.2d at 95, 5 FEP Cases at 774. Plaintiff brought suit under the Civil Rights Acts of 1866, 1871, and 1964, 42 U.S.C. §§ 1981, 1983, 2000e (1970). The court, while noting that Title VII now applies to public schools, found that the Act did not apply because plaintiff had failed to exhaust her administrative remedies. 476 F.2d at 95 n.1, 5 FEP Cases at 774 n.1.

[37] Id. at 96, 5 FEP Cases at 775.

[38] Id. at 96, 5 FEP Cases at 775-76.

[39] Cf. Griffin v. Illinois, 351 U.S. 12 (1956).

[40] LaFleur v. Cleveland Bd. of Educ., 94 S. Ct. 791, 6 FEP Cases 1253 (1974).

[41] Id. at 801, 6 FEP Cases at 1259-60.

rules were found to be an unwarranted governmental infringement upon the constitutionally protected right to freedom of choice in matters of marriage and family life, and in the decision of whether to bear or beget children.[42] In its decision, the Supreme Court consolidated and determined the cases on writ of certiorari from the Sixth Circuit in *LaFleur*[43] and the Fourth Circuit in *Cohen v. Chesterfield County School Board.*[44]

The plaintiff in *Cohen* had been employed by the school board and was forced to take a maternity leave without pay pursuant to a regulation which required teachers to leave work at least four months before the expected birth of a child. The teacher would be declared re-eligible for employment upon submitting a written notice of fitness from a physician assuring the school system that care of the child would cause minimal interferences with her job responsibilities. However, the regulations guaranteed re-employment to the teacher no later than the first day of the school year following the date the board declared her re-eligible. Despite this guarantee of re-employment, the plaintiff filed suit under 42 U.S.C. § 1983 for interference with her constitutional rights.

The district court decided that the regulation was devoid of any rational purpose and that it violated the Equal Protection Clause because it treated pregnancy differently from other disabilities.[45] The circuit court reasoned that the mandatory maternity leave regulation in *Cohen* was not an invidious discrimination based upon sex since "[i]t does not apply to women in an area in which they may compete with men."[46] Because of the widespread use of contraceptives, pregnancy was found to be largely voluntary.[47] Therefore, pregnancy was distinguished from other disabilities, and classifications based upon the status of pregnancy did not lack a rational basis. Acknowledging the Supreme Court's decision in *Reed v. Reed,* the Fourth Circuit nevertheless found that the regulation did not amount to an invidious classification based upon sex and that the regulation served a reasonable objective: assuring educational continuity.[48]

The mandatory maternity leave regulation involved in *LaFleur*

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[42] Id. at 796, 6 FEP Cases at 1256-57.

[43] 465 F.2d 1184, 4 FEP Cases 1070 (6th Cir. 1972).

[44] 474 F.2d 395, 5 FEP Cases 341 (4th Cir. 1973).

[45] Cohen v. Chesterfield County School Bd., 326 F. Supp. 1159, 1161 (E.D. Va. 1971). This case was decided in the trial court several months prior to the Supreme Court's Equal Protection decision in *Reed.*

[46] 474 F.2d at 397, 5 FEP Cases at 342. The opinion was written by Haynsworth, Chief Justice.

[47] Id. at 398, 5 FEP Cases at 343.

[48] Id. at 397-99, 5 FEP Cases at 342-44.

required the teacher to terminate employment without pay five months before the expected birth of her child. The teachers were not allowed to return to work until the beginning of the next regular semester following the date the child attained the age of three months, and until the teacher had obtained a physician's certificate attesting to her fitness. However, the regulations challenged in *LaFleur,* unlike those questioned in *Cohen,* did not guarantee re-employment for the former teachers, but merely gave them priority in reassignment to any available positions.[49] The district court rendered judgment prior to the Supreme Court decision in *Reed,* and therefore applied the traditional rational basis test, which requires the challenger of the statute or regulation to show that the rule or law has no rational basis.[50] Moreover, the rational basis test allows the court to assume the existence of any state of facts at the time of enactment which would sustain the classification imposed by the statute or regulation.[51] The trial court noted the indignities suffered by pregnant teachers and the resulting disruption of the classroom[52] and concluded that there existed a rational basis for the rule distinguishing pregnant teachers from all other teachers.[53] The Sixth Circuit reversed, holding that the regulation in *LaFleur* violated the Equal Protection Clause under the *Reed* rationale.[54]

Apparently disregarding the Equal Protection arguments accepted by the district court in *Cohen* and by the court of appeals in *LaFleur,* the Supreme Court determined the cases under the Due Process Clause of the 14th Amendment.[55] The public school authorities contended that the regulations were justified because they promoted continuity of instruction. The Court recognized that the objective of continuity was legitimate, but noted that the regulations actually frustrated the asserted objective in the cases before it by requiring the teachers to leave during the middle of the semester.[56] Early notice of the date chosen by the teacher as the commencement of her maternity leave would better serve the interest of continuity.[57] Consequently, the Court concluded that the arbitrary cut-off

[49] 94 S. Ct. at 793, 6 FEP Cases at 1254-55.

[50] 326 F. Supp. 1208, 1212, 3 FEP Cases 503 (N.D. Ohio 1971). This rule is derived from the holding of the Supreme Court in McGowan v. Maryland 366 U.S. 420 (1961) that such classifications should be upheld unless wholly irrelevant to achievement of the state's objective; such statute or regulations should be sustained if any state of facts could reasonably be conceived to justify them.

[51] 366 U.S. at 425.

[52] 326 F. Supp. at 1210, 3 FEP Cases at 505.

[53] Id. at 1214, 3 FEP Cases at 508.

[54] 465 F.2d at 1188-89, 4 FEP Cases at 1073.

[55] In concurring opinion, Justice Powell contended that equal protection was the proper frame of reference. 6 FEP Cases at 1261.

[56] 94 S. Ct. at 797, 6 FEP Cases at 1257-58.

[57] Id., 6 FEP Cases at 1257.

dates embodied in the regulations lacked a rational relationship to the objective of continuity, thereby violating Due Process.[58]

In *LaFleur,* the Supreme Court also rejected the other asserted justifications of mandatory maternity leave regulations, though it left open the question of the permissibility of maternity leave regulations at some definite date close to the expected date of birth. The school boards contended that the regulations served the interest of protecting unfit teachers, but the rules swept too broadly and the presumption of unfitness was invalidated: " 'permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the 5th and 14th Amendments.' "[59] Moreover, the Court stated that "administrative efficiency alone is insufficient to make valid what otherwise is a violation of due process of law."[60] Finally, the Court held invalid the regulation which prevented a teacher from returning to work until her child reached the age of three months, since that provision also created an irrebuttable presumption of unfitness which seriously burdened the exercise of protected constitutional liberty.[61]

While the *LaFleur* Court struck down the mandatory maternity leave regulations in question, it did leave open the question of the permissibility of mandatory maternity leave regulations requiring termination of employment at some definite date close to the expected date of birth.[62] The Court noted that the inclusion of state and local governments within the coverage of Title VII in 1972, combined with the EEOC guideline providing that a mandatory maternity leave regulation or termination policy for pregnant women presumptively violated the Civil Rights Act of 1964, might have the effect of reducing the practical impact of *LaFleur.*[63] Thus, the Court implied that, although mandatory maternity leave regulations are presumptively invalid under the Constitution and may be invalid under Title VII, the rules might nevertheless be justified if sufficiently related to the promotion of a legitimate state interest.

In *Schattman v. Texas Employment Commission,*[64] a regulation of the Employment Commission was sustained which required mandatory maternity leave to commence *two months* before the expected date of delivery. Acknowledging the decision in *Reed,* the

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[58] Id. at 798, 6 FEP Cases at 1258-60.

[59] Id., 6 FEP Cases at 1257-58.

[60] Id. at 799, 6 FEP Cases at 1259.

[61] Id. at 801, 6 FEP Cases at 1260-61.

[62] Id. at 799 n.13, 6 FEP Cases at 1259 n.13.

[63] Id. at 795 n.8, 6 FEP Cases at 1256 n.8. The Court stated that it expressed no view as to the validity of the regulations.

[64] 459 F.2d 32, 4 FEP Cases 353 (5th Cir. 1972) cert. denied, 409 U.S. 1107 (1972), reh. denied, 410 U.S. 959 (1973).

Fifth Circuit concluded that the rule was shown to be both reasonable and rationally related to a legitimate state purpose.[65] In a footnote to its decision in *LaFleur* the Supreme Court referred to *Schattman,* suggesting that a comparison of that case with *Green* and *Buckley,*[66] would demonstrate the split among the circuits on the same issue. This might imply that the cases are not factually distinguishable even though the length of the forced leave involved varied by several months between the cases. This means that a two-month cut-off date would not make reasonable an otherwise irrational mandatory maternity leave regulation under the Due Process approach relied upon in *LaFleur.* The dicta of the Supreme Court indicates that a strong showing of reasonableness must be made to justify the imposition of any cut-off point for the end of employment and the commencement of mandatory maternity leave for public school teachers and, by virtue of Title VII and the EEOC guidelines, for employees of private employers as well.

3. *Grooming Codes:* Willingham; Dodge

In contrast to the maternity leave cases, which have been determined on constitutional grounds up to the present time, suits challenging private employer grooming code regulations have generally been resolved under Title VII of the Civil Rights Act of 1964. Some employers have relied upon the bona fide occupational qualification exception in section 703(e)[67] in defending grooming codes against charges of sex discrimination brought under section 703(a).[68] Two cases decided during the Survey year have highlighted a division among the federal courts on the issue of the permissibility of the discharge of a male employee or refusal to hire a male applicant whose hair length violates employer grooming codes.[69] Since this question pertains to a potentially numerous pool of litigants, these cases would appear to present a significant issue which the Supreme Court may decide in order to resolve the conflict among the lower federal courts.

In *Willingham v. Macon Telegraph Publishing Co.,*[70] the Fifth Circuit rendered judgment for a male applicant who was refused employment because his hair length violated company grooming code standards. The court's opinion was representative of other

[65] 459 F.2d at 41, 4 FEP Cases at 360.

[66] 94 S. Ct. at 795 n.8, 6 FEP cases at 1256 n.8.

[67] 42 U.S.C. § 2000e-2(e) (1970).

[68] 42 U.S.C. § 2000e-2(a) (1970).

[69] Fagan v. National Cash Register Co., 481 F.2d 1115, 5 FEP Cases 1335 (D.C. Cir. 1973); Willingham v. Macon Tel. Publishing Co., 482 F.2d 535, 5 FEP Cases 1329 (5th Cir.), petition for reh. granted, 6 FEP Cases 830 (1973).

[70] 482 F.2d 535, 5 FEP Cases 1329.

cases in which the refusal to hire an applicant for noncompliance with a grooming code has been held to constitute discrimination on the basis of sex in violation of Title VII.[71] The plaintiff, who had passed the company's tests and had previous experience, alleged that he was denied employment as a layout artist in the retail advertising department of the company solely because of the length of his hair. After exhausting his administrative remedies with the EEOC, he filed suit, alleging that he had been the victim of sex discrimination in violation of both section 703 of the Civil Rights Act of 1964,[72] and the Civil Rights Act of 1871.[73] The defendant company contended that it requires employees who have public contact to comply with standards of appearance customarily accepted in the business community, and that the plaintiff's hair length would injure the business and image of the defendant. The district court granted summary judgment for the defendant, reasoning that Congress, in enacting the Civil Rights acts, had not intended to deprive employers of the "fundamental right" to recognize societal mores in the formulation and imposition of reasonable grooming standards.[74] Moreover, it was found that equal employment opportunities had been made available to both sexes by the company, and that equal conditions of employment also existed, since females also had to comply with a grooming code.[75]

In reversing the district court decision, the Fifth Circuit recognized the applicability of section 703 to cases of "sex plus" discrimination, that is, to classifications of employees based on sex plus one other characteristic,[76] such as hair length in the controversy before it. The court reasoned that, in enacting section 703, Congress intended to provide equal employment opportunities for both men and women.[77] "Section 703, therefore, is not limited to situations in which the employer's discriminatory employment practice is based solely on sex but extends to all differences in the treatment of men and women resulting from sex stereotypes."[78] Since the grooming code prohibited only males from wearing their hair long, it treated

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[71] See Donohue v. Shoe Corp. of America, 337 F. Supp. 1357, 4 FEP Cases 393 (C.D. Cal. 1972).

[72] 42 U.S.C. § 2000e-2 (1970).

[73] 42 U.S.C. § 1983 (1970).

[74] Willingham v. Macon Tel. Publishing Co., 352 F. Supp. 1018, 1021, 5 FEP Cases 847, 849 (M.D. Ga. 1972).

[75] Id.

[76] 482 F.2d at 537, 5 FEP Cases at 1331. See Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 3 FEP Cases 621 (7th Cir.), cert. denied, 404 U.S. 991, 4 FEP Cases 37 (1971); Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109, 1171-72 (1971).

[77] 482 F.2d at 537, 5 FEP Cases at 1331.

[78] Id.

applicants differently because of a sex stereotype. Applying the rule that section 703 does not permit the use of one standard for men and another for women where both are similarly situated, the Fifth Circuit found that a grooming code which requires different hair lengths for male and female job applicants discriminates on the basis of sex in violation of section 703.[79] The plaintiff's contentions in *Willingham* drew support from the EEOC regulation providing that if sex is a factor in the application of a grooming code, sex discrimination is involved.[80] This construction of the Act by the EEOC was afforded great deference by the Fifth Circuit.[81] The possibility that the employer might justify its grooming code as a bona fide occupational qualification on remand was acknowledged, since that issue had not been considered.[82]

In contrast to the Fifth Circuit, the District of Columbia Circuit in two Survey year cases upheld hair length requirements, similar to that found violative of Title VII in *Willingham,* on the ground that the grooming codes did not discriminate on the basis of sex, thus dispensing with the necessity of showing that hair length was a bona fide occupational qualification.[83] In *Dodge v. Giant Food, Inc.,*[84] the court found that the hair-length regulations, which embodied a distinction based upon sex by treating long-haired males differently than long-haired females, did not discriminate or classify within the meaning of the statutory proscription of sex discrimination. Therefore, it was unnecessary to reach the question of whether the grooming code could fall within the BFOQ exception to the section 703 prohibitions on the ground that hair length was a bona fide occupational qualification under the circumstances.[85] Adopting the rationale of its previous decision in *Fagan v. National Cash Register Co.,*[86] the District of Columbia Circuit asserted that "the sexual

[79] Id. at 538, 5 FEP Cases at 1331-32.

[80] Id.

[81] Id., citing Griggs v. Duke Power Co., 401 U.S. 424 (1971).

[82] Id. In Boyce v. Safeway Stores, Inc., 351 F. Supp. 402, 5 FEP Cases 285 (D.D.C. 1972), which presented a factual situation similar to *Willingham*, but which involved a discharge rather than a refusal to hire, the trial court held that a grooming code hair length requirement for males only, constituted a BFOQ because it had "demonstrable relevance" to job performance within the meaning of section 703(e). 351 F. Supp. at 403-04, 5 FEP Cases at 286.

[83] Dodge v. Giant Food, Inc., 488 F.2d 1333, 6 FEP Cases 1066 (D.C. Cir. 1973); Fagan v. National Cash Register Co., 481 F.2d 1115, 5 FEP Cases 1335 (D.C. Cir. 1973). In Baker v. California Land Title Co., 349 F. Supp. 235, 5 FEP Cases 329 (C.D. Cal. 1972), the court reached an identical conclusion based on similar reasoning. The District of Columbia Circuit had previously reached an identical result in Fagan v. National Cash Register Co., 481 F.2d 1175, 5 FEP Cases 1335 (D.C. Cir. 1973).

[84] 488 F.2d 1333, 6 FEP Cases 1066 (D.C. Cir. 1973).

[85] 488 F.2d at 1335, 6 FEP Cases at 1067.

[86] 481 F.2d 1115, 5 FEP Cases 1335.

classification embodied in the hair-length regulations does not significantly affect employment opportunities and thus does not violate the statute" since hair length is not an immutable characteristic.[87] *Dodge* rested in part on the premise that Title VII was not intended to invalidate private employer grooming regulations which do not significantly affect the employment opportunities afforded one sex over another.[88]

The decision in *Dodge* suggested a two-part test of employer regulations which distinguish or classify on the basis of sex stereotypes. The *Dodge* inquiry would require an evaluation of both the degree of immutability of the distinguishing characteristic and the amount of impact that the grooming code has upon employment opportunities afforded the two sexes. On the basis of this framework of analysis, the District of Columbia Circuit found the hair length regulation cases distinguishable from other cases in which the employer had been found to violate section 703 for discriminating on the basis of sex plus another sexually related characteristic. In *Sprogis v. United Air Lines,*[89] a rule which required that stewardesses be unmarried, while stewards were allowed to be married, was held to be unlawful employment discrimination. The *Dodge* court reasoned, however, that marriage is a characteristic less easily altered than length of hair, though neither is immutable.[90]

The decision of the Supreme Court in *Phillips v. Martin Marietta Corp.*[91] supplied the foundation for the holding of the Seventh Circuit in *Sprogis*. *Phillips* is the leading case on the issue of the permissibility of employer policies or rules which classify on the basis of sex. The employer refused to hire the plaintiff in *Phillips* because of its policy against hiring women with pre-school age children, while it had no such policy with respect to men. The Supreme Court held that:

> Section 703(a) requires that persons of like qualifications be given employment opportunities irrespective of their sex. The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men—each having pre-school-age children.[92]

The *Phillips* Court further indicated that such an employment policy must qualify within the section 703(e) exception for bona fide occupational qualifications in order to be upheld.[93]

[87] 488 F.2d at 1336, 6 FEP Cases at 1067-68.
[88] Id. at 1337, 6 FEP Cases at 1069.
[89] 444 F.2d 1194, 3 FEP Cases 621 (7th Cir. 1971).
[90] 488 F.2d at 1337, 6 FEP Cases at 1069.
[91] 400 U.S. 542 (1971).
[92] 91 Id. at 543-44.
[93] 92 Id.

It is submitted that the decisions in *Sprogis* and *Phillips* should have been controlling in *Dodge* and *Fagan*. All four cases involved discrimination or classifications based upon sex plus another characteristic: marriage, young children, and hair length. Title VII prohibits employment discrimination because of sex, and *Phillips* established that discrimination against one sex on the basis of a characteristic shared by both sexes also violates Title VII. The discriminatory impact of the sex-plus classification is the controlling factor, not the immutability of the characteristic. The requirement established by the Supreme Court in *Phillips* that persons of like qualifications be given equal opportunities regardless of sex would appear applicable to the facts in *Dodge,* since the distinguishing factor in both cases was a characteristic other than sex. It is therefore submitted that hair length regulations which treat men differently from women and which affect the employment opportunities of men whose hair fails to comply with the standard constitute impermissible sex discrimination under Title VII and can only be upheld as bona fide occupational qualifications. The section 703(e) exception has generally been construed narrowly[94] and requires a showing that the employer regulation is "reasonably necessary to the normal operation of that particular business or enterprise."[95] It is improbable that hair length requirements for males could qualify as "reasonably necessary to the normal operation" of most businesses and enterprises.

4. *State Female Protective Statutes:* Eslinger; Wernet

The developing judicial doctrines which define employment discrimination based upon sex under either Title VII or the Constitution do not afford automatic relief to the person deprived of equal employment opportunities. The Fourth and Sixth Circuits have held that good faith reliance upon a state female protective statute may preclude an award of damages.[96] State female protective statutes are those laws which regulate conditions and opportunities of employment for female workers only. The EEOC guidelines provide that

> . . . such laws conflict with and are superseded by Title VII of the Civil Rights Act of 1964. Accordingly, such laws

[94] See Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir. 1971); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 387-88 (5th Cir. 1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).

[95] 42 U.S.C. § 2000e-(2)(e) (1970).

[96] Wernet v. Meat Cutters, Local 17, 484 F.2d 403, 404, 6 FEP Cases 602, 603 (6th Cir. 1973); Ash v. Hobart Mfg. Co., 483 F.2d 289, 293, 6 FEP Cases 245, 247 (6th Cir. 1973); Eslinger v. Thomas 476 F.2d 225, 228, 5 FEP Cases 793, 797 (4th Cir. 1973).

> will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception.[97]

However, upon a finding of sex discrimination in employment practices, the decisions of the Fourth and Sixth Circuits indicate that courts will refuse to award discretionary damages where the defendant has acted in good faith reliance upon a presumptively valid state female protective law, or, in certain circumstances, upon a long-standing custom.

The Senate of South Carolina generally employed as pages, in positions of temporary employment, students from the University of South Carolina Law School. After being recommended for appointment as a page by a state senator, the plaintiff in *Eslinger v. Thomas,*[98] a female law student at the university, applied for the position. However, defendant Thomas, Clerk of the Senate, informed her that she could not be employed as a page because of her sex. She brought suit under the 14th Amendment and under section 1983,[99] but the district court denied relief. After plaintiff filed suit, the Senate of South Carolina passed a resolution which provided that females could be employed as "clerical assistants" and as "committee attendants," but not as pages.[100] The resolution required females, but not males, to furnish a statement from their parent or guardian assuming responsibility for the transportation, safety and supervision of the prospective employee.[101] The plaintiff, however, pressed her right to be a Senate page.

Applying the *Reed*[102] test of a fair and substantial relation between the basis of the classification and the object of the classification, which it termed an " 'intermediate approach' " between the rational basis and the compelling interest standards, the Fourth Circuit concluded that the South Carolina Senate resolution denied equal protection,[103] and reversed the trial court's denial of injunctive and declaratory relief.[104] However, damages were not awarded against the Clerk of the Senate in light of the finding that

[97] 29 C.F.R. § 1604.2(b)(1) (1973).

[98] 476 F.2d at 226-27, 5 FEP Cases at 794-95.

[99] 42 U.S.C. § 1983 (1970). *Eslinger* arose prior to the 1972 Amendments.

[100] 476 F.2d at 227, 5 FEP Cases at 796.

[101] Id.

[102] 404 U.S. 71 (1971).

[103] 476 F.2d at 231, 5 FEP Cases at 798.

> We have only to look at our own female secretaries and female law clerks to conclude that an intimate business relationship, including traveling on circuit, between persons of different sex presents no "appearance of impropriety" in the current age, graduated as we are from Victorian attitudes.

Id.

[104] Id. at 232, 5 FEP Cases at 799.

he had acted in good faith reliance upon the long-standing custom against hiring female pages. To hold him liable would, in effect, charge him with the responsibility of predicting developments in constitutional law.[105] The Fourth Circuit reasoned that the inchoate state of the law in the area of sex discrimination justified recognition of a defense against a claim for damages under section 1983, where the defense is based upon good faith and reasonable grounds to believe in the lawfulness of the action taken.[106] Thus, despite a violation of her constitutional right to equal protection of the law under the Fourteenth Amendment, the plaintiff received no damages for resulting lost wages.

The controversy in *Eslinger* arose prior to the passage of the Equal Employment Opportunities Act of 1972, which brought state and local governments under coverage of Title VII.[107] Consequently, *Eslinger* did not involve a determination of rights and remedies under Title VII. However, in *Wernet v. Meat Cutters, Local 17,*[108] the Sixth Circuit reached a similar result under the provisions of Title VII.

In *Wernet,* the plaintiffs' employer had maintained separate seniority lists for men and women during the years in question in order to comply with the female protective statute then in effect in Ohio. The plaintiffs' grievance regarding the separate seniority lists was ultimately arbitrated and resolved in favor of the employer. The plaintiffs filed suit under Title VII against both the employer and the union, but settled with the employer.[109] Although finding that the union had failed to adequately represent the plaintiffs and failed to employ proper grievance procedures in their behalf, the trial court dismissed the complaint against the union because that organization's lack of zeal resulted from good faith reliance upon the female protective statute.[110]

The Sixth Circuit held that good faith reliance by a union, as well as an employer, upon a presumptively valid state female protective statute serves as a defense to a claim for damages for sex discrimination in violation of Title VII.[111] In a dissenting opinion, Judge McCree contended that, since a showing by the plaintiff that the defendant acted in bad faith is not necessary to establish the commission of an unlawful employment practice under the Act, the plaintiff need only show "a prohibited discriminatory consequence

[105] Id. at 229, 5 FEP Cases at 796.
[106] Id. at 230, 5 FEP Cases at 797.
[107] See text at pages — to — supra for a discussion of the 1972 Act.
[108] 484 F.2d 403, 6 FEP Cases 602 (6th Cir. 1973).
[109] Id., 6 FEP Cases at 603.
[110] Id.
[111] Id. at 404, 6 FEP Cases at 603.

of an act intentionally undertaken."[112] Such a showing would establish a violation of Title VII and would empower the court to "order such affirmative action as may be appropriate" pursuant to section 706(g).[113] The statutory language supports the construction that bad faith is not required under section 706(g). Judge McCree made the additional point that unions are not bound by state protective laws and are free to challenge them in grievance and arbitration proceedings.[114] Nonetheless, *Wernet* appears to have been correctly decided. Section 706(g) does not require a finding of bad faith in order to establish a violation of Title VII and to empower the court to grant relief. However, the form of relief granted is discretionary.[115]

The Supreme Court has stated that Congress intended to remedy the consequences of discriminatory employment practices by enacting Title VII,[116] and reliance upon state protective statutes often results in discriminatory employment practices, as the EEOC has formally stated.[117] Therefore, it would appear proper for the courts to exercise the discretionary power granted in section 706(g) to award damages in the form of back pay to persons aggrieved by employer or union reliance upon state female protective statutes. However, that power is discretionary, and it is within the authority of the courts to recognize a good faith reliance defense to a claim for damages.

D. *Discrimination Against Aliens:* Sugarman; Espinoza

The Equal Protection Clause of the 14th Amendment affords protection against employment discrimination against aliens by state and local governments; an aggrieved individual may seek to obtain such protection by instituting suit under section 1983. To the extent that the Fifth Amendment has been found to guarantee equal protection,[1] it would appear that similar rights would accrue to non-citizens against the employment practices of the federal government. However, where state action is not involved in allegedly

[112] Id. at 405, 6 FEP Cases at 605.

[113] 42 U.S.C. § 2000e-5(g) (1970).

[114] 484 F.2d at 405, 6 FEP Cases at 604.

[115] There is some question as to whether *Wernet* is consistent with Vaca v. Sipes, 386 U.S. 171 (1967). See 484 F.2d at 405, 6 FEP Cases at 604. *Vaca* requires a showing of arbitrary, discriminatory, or bad faith conduct on the part of the union to establish a breach of the duty of fair representation. 306 U.S. at 190. If these requirements are alternative, it is possible that good faith union reliance on a female protective statute is discriminatory conduct which may amount to a breach of the duty of fair representation. It would not seem, however, that such reliance is bad faith or arbitrary conduct.

[116] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[117] 29 C.F.R. § 1604.2(b)(1) (1973).

[1] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

discriminatory employment practices, constitutional protection is not available. Litigation during the Survey year raised the possibility that the Title VII prohibition of national origin discrimination might extend to discriminatory practices by private employers against aliens.[2]

Title VII forbids employment discrimination against any person "because of such individual's race, color, religion, sex, or national origin . . . ."[3] However, the Act does not explicitly prohibit discrimination on the basis of alienage or citizenship. The Equal Employment Opportunity Act of 1972[4] brought state and local governments within the coverage of Title VII and separately extended the Act to the federal government in section 717.

During the Survey year, the Supreme Court resolved the question of the permissibility of discrimination in employment based on citizenship as practiced by private employers[5] and by state governments.[6] But only the issue of private employer discrimination against aliens was determined under the provisions of Title VII of the Civil Rights Act of 1964,[7] and the constitutionality of the requirement of citizenship for employment in the federal civil service remains undecided by the Supreme Court. The result of the Supreme Court's determinations would seem to allow private employment discrimination based upon citizenship, while prohibiting across-the-board discrimination against aliens in state and local government employment.

In *Sugarman v. Dougall,*[8] the Court held that a state law which indiscriminately prohibits the state from employing aliens in competitive positions violates the Equal Protection Clause of the Fourteenth Amendment. *Sugarman* is a logical outgrowth of prior case law. The inclusion of aliens under the shelter of the Equal Protection Clause is long-recognized and well-established.[9] In *Truax v. Raich,*[10] the Court struck down an Arizona statute which mandated that all employers of five or more workers must employ at least 80%

[2] Espinoza v. Farah Mfg. Inc., 414 U.S. 86 (1973).

[3] 42 U.S.C. § 2000e-2 (1970).

[4] 86 Stat. 103 (1972).

[5] Espinoza v. Farah Mfg. Inc., 414 U.S. 86 (1973).

[6] Sugarman v. Dougall, 413 U.S. 634 (1973).

[7] 42 U.S.C. §§ 2000e et seq. (1970), Pub. L. No. 92-261 (1972).

[8] 413 U.S. 634 (1973).

[9] Graham v. Richardson, 403 U.S. 365, 371 (1971); Takahashi v. Fish & Game Comm'n, 334 U.S. 410, 420 (1948); Truax v. Raich 239 U.S. 33, 39 (1915); Yick Wo v. Hopkins 118 U.S. 356, 369 (1886).

[10] 239 U.S. 33, 42 (1915). However, as pointed out by Justice Rehnquist in his dissent in *Sugarman,* the Court in *Truax* noted that the case did not involve discrimination against aliens in the regulation or distribution of the public domain or resources of the people, which would have been permissible. 413 U.S. at 654, 5 FEP Cases at 1160. This was a recognition of the "special public interest doctrine." See text at note 12, supra.

United States citizens. In *Takahashi v. Fish & Game Commission* the Court stated that a state's power "to apply its laws exclusively to its alien inhabitants as a class is confined within narrow limits."[11] Nonetheless, prior to *Sugarman,* both state and federal laws and regulations prohibited employment of non-citizens generally, as sanctioned in the early decades of the twentieth century by decisions which recognized a special public interest doctrine.[12] This doctrine justified the state's restriction of its resources, including public employment, to citizens. The special public interest doctrine was explicitly laid to rest in *Graham v. Richardson,*[13] where the Court held that state laws conditioning the receipt of welfare benefits upon either citizenship or residence of 15 years violated the Equal Protection Clause. Reasoning that "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny,"[14] Justice Blackmun, writing for the Court, applied the test of strict judicial scrutiny and concluded that the public interest doctrine did not justify the classification and consequent unequal treatment of aliens.[15] This decision laid the foundation for the Court's holding in *Sugarman,* also written by Justice Blackmun.[16]

Prior to the Equal Employment Opportunity Act of 1972, Title VII coverage did not extend to government discrimination in employment. As a result, aggrieved persons were forced to develop other theories of relief. In *Sugarman v. Dougall,*[17] arising prior to the 1972 amendments and decided before *Espinoza v. Farah Manufacturing Co.,*[18] the Supreme Court sustained a constitutional challenge to a New York statute which indiscriminately prohibited the employment of aliens in competitive civil service positions, on the ground that it violated the Equal Protection Clause of the Fourteenth Amendment. In *Sugarman,* the plaintiffs, who had never attempted to become United States citizens, were discharged from their clerical and administrative positions of employment with the government of New York City pursuant to the statutory requirement of citizenship.[19] They instituted a class action challenging the constitutionality of the law and seeking an injunction and damages for lost earnings. A three-judge district court ruled that the statute

[11] 334 U.S. at 420.

[12] Crane v. New York, 239 U.S. 195, aff'g 214 N.Y. 154, 161, 108 N.E. 427, 429 (1915); Heim v. McCall, 239 U.S. 175 (1915).

[13] 403 U.S. 365 (1971).

[14] Id. at 372.

[15] Id. at 376.

[16] 413 U.S. 634.

[17] Id.

[18] 414 U.S. 86 (1973).

[19] 413 U.S. at 636.

violated the Fourteenth Amendment and the Supremacy Clause and granted injunctive relief.[20]

Writing for the Court in affirming the judgment of the trial court,[21] Justice Blackmun stated that the "precise and narrow issue" presented by the case was "whether New York's flat statutory prohibition against the employment of aliens in the competitive classified civil service is constitutionally valid."[22] The jobs in the "competitive class" to which the citizenship requirement applied ranged from menial to policy-making positions, while citizenship was not a prerequisite for employment in other positions which would naturally seem to fall within the statutory purpose. Therefore, Justice Blackmun concluded that the New York scheme was indiscriminate and had little, if any, relationship to the state's proffered justification of promoting the integrity and efficiency of the civil service.[23] Relying on *Graham v. Richardson,*[24] the Court stated that "classifications based on alienage are subject to close judicial scrutiny" and examined both "the substantiality of the State's interest in enforcing the statute" and "the narrowness of the limits within which the discrimination is confined."[25] The Court rejected the special public interest doctrine and therefore held that the statute did not survive the necessary close judicial scrutiny.[26] However, the holding in *Sugarman* was explicitly limited to flat bans on government employment of aliens in positions which are insufficiently related to a State's legitimate interest, leaving open the possibility of a citizenship requirement for public employment which "rests on legitimate state interests" relating either to qualifications for particular positions or to characteristics of the employee.[27] However, *Espinoza* indicates that the 1972 inclusion of governmental employers within Title VII might afford protection to aliens in cases such as *Sugarman,* if the governmental employment practice has the effect of national origin discrimination.

Section 703 of Title VII explicitly prohibits discrimination against any individual because of such individual's national origin.[28] This proscription generated the question of whether citizenship discrimination is forbidden by Title VII within the national origin

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[20] 339 F. Supp. 906, 3 FEP Cases 1202 (S.D.N.Y. 1971) aff'd 413 U.S. 634 (1973).

[21] Justice Rehnquist dissented. 413 U.S. at 649-64.

[22] 413 U.S. at 638-39.

[23] Id. at 642.

[24] 403 U.S. 365 (1971).

[25] 413 U.S. at 642-43.

[26] Id. at 643. See discussion of the special public interest doctrine in text, supra note 12.

[27] Id. at 646-47, 5 FEP Cases at 1157. The decision in *Sugarman* was followed in Mendoza v. City of Miami, 483 F.2d 430, 6 FEP Cases 492 (5th Cir. 1973).

[28] 42 U.S.C. § 2000e-2 (1970).

discrimination prohibition. The Supreme Court, in *Espinoza,* held that citizenship discrimination which is not shown to have the impact of national origin discrimination, is not prohibited by Title VII, despite an EEOC regulation to the contrary.[29] In *Espinoza,* a lawfully admitted resident alien was denied employment on the basis of a long-standing company policy against the employment of aliens, although the vast majority of employees at the particular plant in question were of Mexican ancestry. After exhausting her administrative remedies with the EEOC, pursuant to section 706(e),[30] Espinoza brought suit, alleging national origin discrimination—a violation of section 703(a)(1) of Title VII.[31] Reasoning that the phrase "national origin" is broad enough to encompass both "citizenship" and "nationality," and that classifications based upon alienage are inherently suspect, the district court granted summary judgment to the plaintiff, holding that a refusal to hire because of lack of United States citizenship alone is prohibited as discrimination on the basis of national origin within Title VII.[32] The district court found that the legislative history of Title VII supported the EEOC guideline prohibiting citizenship discrimination, as the original purpose clause of Title VII declared that "all persons within the jurisdiction of the United States have a right to the opportunity for employment without discrimination on account of . . . national origin."[33] The Fifth Circuit reversed, concluding that the statutory phrase "national origin" did not embrace citizenship.[34] The Fifth Circuit refused to follow the EEOC guideline and responded to the district court's reliance upon the purpose clause by noting that the fact that all persons are protected under the Act does not of itself indicate what forms of discrimination are proscribed.[35]

The Supreme Court, with Justice Douglas dissenting, affirmed the decision of the Fifth Circuit, reasoning that the plain language of the statute supported that holding, since "national origin" refers to a person's, or to a person's ancestors' country of birth, not to citizenship.[36] The Court noted that a long-standing Civil Service Commission regulation requires federal employees to be citizens,[37]

[29] 414 U.S. at 86.

[30] 42 U.S.C. § 2000e-5(e) (1970).

[31] 42 U.S.C. § 2000e-2(a)(1) (1970).

[32] 343 F. Supp. 1205, 1207, 4 FEP Cases 929, 930 (W.D. Tex. 1971), rev'd 462 F.2d 1331, 4 FEP Cases 931 (5th Cir. 1972); 414 U.S. 86, 6 FEP Cases 933 (1973).

[33] 343 F. Supp. at 1206, 4 FEP Cases at 929.

[34] 462 F.2d 1331, 4 FEP Cases 931 (5th Cir. 1972), aff'd 414 U.S. 86, 6 FEP Cases 933 (1973).

[35] 462 F.2d at 1335, 4 FEP Cases at 933-34.

[36] 414 U.S. at 88-89. The Court also found that the meager legislative history on the question, supported this construction. Id.

[37] Id.

and that, at the same time, section 701(b)[38] makes it the "policy of the United States to insure equal employment opportunities for Federal employees without discrimination because of . . . national origin . . ." Furthermore, since 1964, Congress has passed legislation barring aliens from federal employment.[39] The Court consequently refused to interpret the term "national origin" to embrace citizenship requirements where to do so would necessitate a conclusion "that Congress itself has repeatedly flouted its own declaration of policy."[40]

In adopting a literal interpretation of the section 703 prohibition of national origin discrimination, the Court declined to follow the interpretative guideline of the EEOC,[41] reasoning that, although entitled to great deference, such administrative interpretations are not controlling where they conflict with obvious congressional intent.[42] However, the Court agreed that aliens are protected from discrimination under the Act:[43] "[c]ertainly Title VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."[44] In his dissenting opinion, Justice Douglas stated that the EEOC position was the correct one: that discrimination on the basis of citizenship *always* has the effect of national origin discrimination. Citing language in *Griggs v. Duke Power Co.*,[45] to the effect that Title VII prohibits practices neutral on their face which create "artificial, arbitrary, and unnecessary barriers to employment" resulting in discrimination "on the basis of racial or other impermissible classification," Justice Douglas contended that citizenship discrimination was proscribed by Title VII as it necessarily has the effect of national origin discrimination.[46] The majority rejected this approach, holding that discrimination on the basis of citizenship alone is not prohibited by Title VII and implying that employment discrimination on the basis of citizenship will not be presumed to have the effect of national origin discrimination. The decision in *Espinoza* will probably have the consequence of requiring evidence that discrimination on the basis of alienage has the effect of discrimination

[38] 42 U.S.C. § 2000e(b) (1970).

[39] 414 U.S. at 90.

[40] Id.

[41] The regulation provides: "Because discrimination on the basis of citizenship has the effect of discrimination on the basis of national origin, a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of his citizenship . . . ." 29 C.F.R. § 1606.1(d) (1973).

[42] 414 U.S. at 94-95.

[43] Id. at 95.

[44] Id. at 92.

[45] 401 U.S. 424, 430-31 (1971).

[46] 414 U.S. at 96.

on the basis of national origin, or possibly race, in order to bring the discriminatory practices within the prohibitions of Title VII.

Neither *Sugarman* nor *Espinoza* involved the issue of whether federal statutes and regulations which discriminate against non-citizens in employment by the federal government are susceptible to challenge on constitutional grounds.[47] The courts of appeals for the District of Columbia and the Ninth Circuit took different approaches when presented with this question. Both *Jalil v. Hampton*[48] and *Wong v. Hampton*[49] involved challenges of the same statutes and regulations. The authorizing statute of the Civil Service Commission provides in part:

> The President may—
>
> (1) prescribe such regulations for the admission of individuals into the civil service in the executive branch as will best promote the efficiency of that service.[50]

Pursuant to this statutory grant of power, the President promulgated Executive Order 10577,[51] authorizing the Civil Service Commission to establish qualifications for admission or rating in civil service examinations including, among others, standards based upon citizenship. The Civil Service Commission consequently issued a regulation conditioning appointments and admission to examinations on United States citizenship.[52] The cases also involved a statute prohibiting the use of appropriated funds for the payment of salaries to aliens.[53] Though the Court of Appeals for the District of Columbia failed to reach the constitutional issue, the Ninth Circuit in *Wong* held that the Civil Service Commission regulation indiscriminately banning aliens from employment in the federal service violates the Due Process Clause of the Fifth Amendment.[54]

The court in *Jalil* remanded the case to the district court for insufficient findings of fact without discussing the constitutional questions raised by appellant. However, the circuit court intimated that the validity of the Civil Service regulation was questionable under the statutory authorization.[55] The court noted that classifications based on alienage are suspect and justifiable only

[47] 413 U.S. at 646 n.12; 414 U.S. at 95.
[48] 460 F.2d 923, 5 FEP Cases 1351 (D.C. Cir.), cert. denied, 409 U.S. 887 (1972).
[49] — F.2d —, 7 FEP Cases 58 (9th Cir. 1974).
[50] 5 U.S.C. § 3301 (1970).
[51] 19 Fed. Reg. 7521 (1954).
[52] 5 C.F.R. § 338.101 (1973).
[53] Public Works Appropriation Act of 1970, Pub. L. 91-144, § 502, 83 Stat. 323, 336-7.
[54] — F.2d —, 7 FEP Cases at 65.
[55] 460 F.2d at 928-29 nn.11, 15, 5 FEP Cases at 1354-55 nn.11, 15.

upon a showing of a compelling governmental interest.[56] The decision in *Jalil* suggested that the indiscriminate exclusion of aliens from federal civil service employment might be unauthorized in that the regulation would not "best support the efficiency of that service."[57] In his dissenting opinion, Chief Judge Bazelon foreshadowed the *Wong* decision in urging that the constitutional issue should have been determined. He stated that "a compelling state interest, apart from the now discredited 'special public interest' in dispensing financial benefits to citizens over aliens," must be shown if the inherently suspect classification based on alienage was to be sustained under the Equal Protection Clause.[58]

In holding that the Civil Service Commission regulations discriminate unreasonably against aliens, based only on their status as aliens, the Ninth Circuit relied on the opinion in *Sugarman* and on the dissenting opinion in *Jalil*.[59] In contrast to the result suggested by the majority in *Jalil*, the Ninth Circuit in *Wong* did not find that the regulations were unauthorized by statute or invalid because conflicting with other statutes and regulations. Without considering the issue of whether the citizenship requirement best promoted the efficiency of the civil service, within the meaning of the authorizing statute, the court reasoned that the regulation complemented the statutory prohibition of the payment of salaries to aliens from appropriated funds in the Public Works Appropriation Act.[60] Appellants contended that the citizenship requirement was invalid by reason of inconsistency with Executive Order 11478 prohibiting discrimination in federal employment because of race, color, religion, sex or national origin.[61] Noting the Supreme Court's holding in *Espinoza* that the prohibition of national origin discrimination did not encompass discrimination against non-citizens as such, the Ninth Circuit distinguished the issue before it: the right to federal government employment. However, the court stated that, even if the citizenship requirement contravenes Executive Order 11478, the conflict would not be judicially reviewable as the Executive Order merely declares a general policy.[62] Being unable to dispose of the case on non-constitutional grounds, the court proceeded to consider the constitutional challenge to the Civil Service regulation.

In determining the constitutionality of a classification based on

[56] Id. at 928-29, 5 FEP Cases at 1354.
[57] Id. at 927, 5 FEP Cases at 1353.
[58] Id. at 930, 5 FEP Cases at 1355.
[59] — F.2d —, 7 FEP Cases at 64.
[60] Id. at —, 7 FEP Cases at 59-60.
[61] 34 Fed. Reg. 12985 (1969).
[62] — F.2d —, 7 FEP Cases at 61-62.

alienage, the Ninth Circuit properly applied the compelling governmental interest test. The court found authority for the imposition of an equal protection guarantee against alien discrimination by the federal government in the Due process Clause of the Fifth Amendment.[63] Neither the special public interest doctrine nor the arguments based on loyalty and security advanced by the appellees justified the indiscriminate exclusion of aliens from the civil service. The Ninth Circuit in *Wong* concluded that the Civil Service regulation imposed "such an impermissible discrimination as to be a denial of due process" and consequently violates the Fifth Amendment.[64]

It would appear that *Wong* significantly increases the constitutional rights of aliens to employment by the federal government. The decision extends greater protection under the Constitution than the Supreme Court found under Title VII against private employment discrimination in *Espinoza*—which required a showing of practices having the purpose or effect of national origin discrimination. However, *Wong* would appear to be a consistent and logical outgrowth of the Supreme Court's holding in *Sugarman*. A denial of equal protection by the federal government can amount to a Fifth Amendment denial of due process on the authority of *Bolling v. Sharpe*.[65] Therefore, *Wong* should establish the constitutional invalidity of the Civil Service Commission regulation requiring citizenship for federal employment. The Supreme Court rejected the special public interest doctrine and stated that aliens were a suspect class in *Sugarman*. There is little likelihood that a compelling governmental interest can be shown, on national security or other grounds, which would justify the continuation of the indiscriminate prohibition of employment of noncitizens in the federal civil service.

E. *Remedies–Affirmative Relief*

1. *Back Pay:* N.L. Industries; Rosen; Head

During the Survey year, the federal courts, with varying degrees of harmony, have recognized new forms of discriminatory employment practices[1] under both Title VII and the Constitution in the areas of national origin discrimination and sex discrimination. Identification of these additional forms of discrimination accents the significance of issues related to the appropriateness or necessity of certain forms of affirmative relief.

[63] Bolling v. Sharpe, 347 U.S. 497, 499 (1954).
[64] — F.2d at —, 7 FEP Cases at 63.
[65] 347 U.S. 497, 499 (1954).

[1] See discussion in text supra at pages 1203-42.

Title VII explicitly authorizes an award of affirmative relief "[i]f the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice . . ."[2] Section 706(g), in defining affirmative relief, provides that:

> the court may enjoin the respondent from engaging in such unlawful employment practice, and *order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay* (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate.* Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence . . . shall operate to reduce the back pay otherwise allowable.[3]

A showing of either bad faith or discriminatory intent is not necessary to permit a finding that an employer, employment agency, or union has intentionally engaged in an unlawful employment practice[4]—an intentional act or practice satisfies the statutory language. In *Griggs v. Duke Power Co.*, the Supreme Court stated that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[5] Thus, the court may award injunctive and affirmative relief under section 706(g) if it finds that an intentional employment practice has discriminatory impact. "Under the Act, practices, procedures or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo or prior discriminatory employment practices."[6] In *Griggs*, the court stated that the "touchstone" or test, is business necessity and found that the employer's testing and educational requirements violated Title VII since they did not "bear a demonstrable relationship" to successful job performance.[7] According to *Griggs*, employment practices which have discriminatory impact are prohibited by Title VII unless the employer justifies them by a showing of business necessity.

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[2] 42 U.S.C. § 2000e-5(g) (1970).

[3] 42 U.S.C. § 2000e-5(g) (Supp. II, 1972), amending 42 U.S.C. § 2000e-5(g) (1970) (emphasis added). The phrase "but is not limited to" was added in 1972. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

[4] Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971).

[5] Id.

[6] Id. at 430.

[7] Id. at 431.

The business necessity defense operates to foreclose the availability of relief to persons aggrieved by discriminatory employment practices. Decisions of the lower federal courts have clarified the business necessity test.[8] A "business purpose" will not suffice to justify the discriminatory impact of an employment policy.[9] However, an employer may avoid liability under Title VII if it can show that its discriminatory employment practice was essential or necessary to promote safety and efficiency in the employer's business, and that there was no reasonably available alternative with less discriminatory impact.[10] A showing of such a business necessity is an adequate justification of the discriminatory effects of the employment practice and consequently a recognized defense to an award of back pay under Title VII.[11] In the absence of a showing of business necessity, the federal courts have generally awarded back pay to persons aggrieved by employment practices which violate Title VII.[12] However, the Eighth Circuit alone, in *United States v. N.L. Industries,*[13] a Survey year case, continued to refuse to make the remedy of back pay available under Title VII.

In *N.L. Industries,* the Attorney General of the United States, pursuant to his powers under section 707,[14] instituted an action against N.L. Industries, charging discrimination against blacks in the maintenance of the company's seniority system, in job assignment policies, in the selection of foremen, and in hiring white collar personnel.[15] The collective bargaining agreement created a dual seniority system in which departmental seniority, based upon length of service within a department, governed awards of vacant jobs in the department, the order of layoff, and the order of recall within that department; plant-wide seniority, based upon length of service with the company, determined length of vacations and the outcome of interdepartmental job bidding. Job vacancies within a department were initially open only to intra-departmental bids. Prior to

[8] See Comment, 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1348, 1362 (1972).

[9] Robinson v. Lorillard Corp., 444 F.2d 791, 798, 3 FEP Cases 653, 657-58 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

[10] United States v. Jacksonville Terminal, 451 F.2d 418, 451, 3 FEP Cases 862, 889 (5th Cir. 1971), cert. denied, 406 U.S. 906 (1972); United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 3 FEP Cases 589, 596 (2d Cir. 1971); Robinson v. Lorillard Corp., 444 F.2d at 798, 3 FEP Cases at 57-58. The EEOC has issued "Guidelines on Employee Selection Procedures" which contain detailed definitions of discriminatory hiring tests and specific validation requirements for employment tests 29 C.F.R. § 1607 (1973).

[11] Head v. Timken Roller Bearing Co., 486 F.2d at 870, 877, 6 FEP Cases 813, 817 (6th Cir. 1973).

[12] See discussion of cases in text at note 31 infra.

[13] 479 F.2d 354, 379, 5 FEP Cases 823, 843 (8th Cir. 1973).

[14] 42 U.S.C. § 2000e-6 (1970).

[15] 479 F.2d at 358, 5 FEP Cases at 826.

1962, the Company discriminated against blacks by assigning them exclusively to the Labor Department seniority group, and by prohibiting transfers from the Labor Department prior to 1963.[16] The facts established that the detrimental effects of an interdepartmental transfer under the dual seniority system inhibited blacks from transferring out of the Labor Department after 1963.[17] Finding that the present seniority system perpetuated the effects of past discrimination, the Eighth Circuit reversed the decision of the trial court and relied upon *Griggs*[18] in holding that implementation of that system constituted an unlawful employment practice proscribed by Title VII, regardless of the employer's good faith or absence of discriminatory intent.[19] Reasoning that "[b]usiness purpose alone is not enough to justify an employment practice which preserves the effects of past discrimination,"[20] the circuit court held that the district court applied the improper business purpose test and that the seniority program was not justified by business necessity.[21]

The company had engaged in other racially discriminatory practices in selecting foremen[22] and in testing and hiring certain white collar employees.[23] The Eighth Circuit directed the district court on remand to award most of the injunctive relief sought by the government.[24] The relief included the carry-over of Labor Department seniority by employees who transferred into other departments as well as pay rate retention. The court directed both the institution of changes in hiring and recruiting practices and the selection of foremen from a list of eligibles on the basis of merit.[25] Though it is not clear whether the government sought an award of back pay to aggrieved employees, the Eighth Circuit discussed that issue at length and refused to make such an award.[26]

The determination of the *N.L. Industries* court not to award back pay abruptly and incongruously followed a thorough and convincing analysis in the court's opinion of the appropriateness of an award of back pay.[27] The court reasoned that back pay awards have two roles in employment discrimination cases: they provide compensation to those discriminated against for actual loss of pay,

[16] 479 F.2d at 359, 5 FEP Cases at 826-27.
[17] Id.
[18] 401 U.S. 424, 3 FEP Cases 175 (1971).
[19] 479 F.2d at 360-63, 5 FEP Cases at 827-29.
[20] Id. at 365-66, 5 FEP Cases at 832.
[21] Id. at 366, 5 FEP Cases at 832-33.
[22] Id. at 367-68, 5 FEP Cases at 834.
[23] Id. at 369-70, 5 FEP Cases at 835-36.
[24] Id. at 373-80, 5 FEP Cases at 838-44.
[25] Id.
[26] Id. at 378-80, 5 FEP Cases at 842-43.
[27] Id.

and they act as a deterrent to employers and unions, thereby performing a crucial function in the remedial process.[28] The company could have unilaterally eliminated the discriminatory practices and the parties responsible appeared before the court; thus, backpay awards would have been appropriate under the circumstances of the case. But the court in *N.L. Industries* nonetheless declined to make such an award, giving only the following explanation of its decision:

> [I]n this Circuit the law in regard to back pay has not been adequately defined to provide employers and unions with notice that they will be liable for a discriminatee's economic losses due to continuation of past or present discriminatory policies.[29]

It can arguably be inferred that the Eighth Circuit, having defined the law in this case, and thereby having given employers and unions notice, will in the future grant back pay awards. Although back pay awards are not expressly made mandatory by Title VII, the decision in *N.L. Industries* conflicts with results reached by other circuits on similar facts and it clearly frustrates the purpose of Title VII.[30]

Prior case law in the courts of appeals recognized the appropriateness of back pay awards under Title VII. In the leading case, *Bowe v. Colgate-Palmolive Co.*,[31] the Seventh Circuit stated that "[t]he clear purpose of Title VII is to bring an end to the proscribed discriminatory practices and to make whole, in a pecuniary fashion, those who have suffered . . ."[32] In *Robinson v. Lorillard Corp.*,[33] a case factually similar to *N.L. Industries,* the Fourth Circuit reasoned that "[t]he back pay award is not punitive in nature, but equitable—intended to restore the recipients to their rightful economic status absent the effects of the unlawful discrimination."[34] Congress apparently intended to encourage awards of back pay under Title VII, since section 706(g) expressly authorizes such relief.[35] During the Survey year, the Sixth Circuit, following the Fourth and Seventh Circuits in *Lorillard* and *Bowe* respectively, specifically acknowledged the propriety of back pay awards under

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[28] Id.

[29] Id. at 380, 5 FEP Cases at 843.

[30] However, good faith reliance on an apparently valid female protective statute has been recognized as a sufficient justification for the denial of a back pay award. Kober v. Westinghouse Elec. Corp., 480 F.2d 240, 5 FEP Cases at 1166 (3d Cir. 1973).

[31] 416 F.2d 711, 2 FEP Cases 121 (7th Cir. 1969).

[32] Id. at 720, 2 FEP Cases at 126.

[33] 444 F.2d 791, 3 FEP Cases 653 (4th Cir.), cert. dismissed, 404 U.S. 1006 (1971).

[34] Id. at 802, 3 FEP Cases at 661.

[35] 42 U.S.C. § 2000e-5(g) (1972).

Title VII,[36] while the Fifth Circuit in *Peters v. Missouri Pacific R.R. Co.*,[37] affirmed a back pay award to retired employees without discussion, and the Third Circuit cited *Bowe* in ordering the payment of back retirement compensation.[38]

In *Head v. Timken Roller Bearing Co.*,[39] the plaintiff employees brought a class action against the employer, Timken, and against their labor union for the creation and enforcement of an alleged racially discriminatory seniority and transfer system, which was very similar to the plan involved in *N.L. Industries*.[40] Prior to the effective date of the Civil Rights Act of 1964, Timken employed racially discriminatory hiring procedures which, coupled with a departmental seniority system in operation until 1968, denied equal opportunity to black employees.[41] The Sixth Circuit agreed with the trial court's holding that the seniority system was not justified by business necessity.[42] However, the circuit court held that the district court erred in refusing to award back pay to the plaintiffs.[43]

Relying on *Bowe* and *Lorillard*, the Sixth Circuit in *Head* reasoned that back pay is an appropriate remedy under Title VII and that the legislative history of section 706(g) revealed the Congressional intent to give the courts wide discretion in exercising their equitable powers to eliminate discrimination and to restore aggrieved persons to their rightful economic position.[44] Significantly, *Head* would support a rule that back pay is required under Title VII in the absence of unusual circumstances justifying a denial of such relief:

> The finding of discrimination by the district court, in addition to the nature of the relief (compensatory rather

[36] Head v. Timken Roller Bearing Co., 486 F.2d 870, 876, 6 FEP Cases 813, 816-17 (6th Cir. 1973).

[37] Peters v. Missouri Pac. R.R., 483 F.2d 490, 5 FEP Cases 853, 854 (5th Cir. 1973). The court affirmed the award of back wages to the plaintiffs, six retired black employees of the railroad and the reinstatement of those under age 70. The district court correctly concluded that the employer had violated section 703(a) of Title VII in entering and enforcing a collective bargaining agreement with the all-black union which provided for mandatory retirement at age 65, while also contracting with the counterpart white union for mandatory retirement at age 70. Id. at 492-93, 5 FEP Cases at 854. Even though the agreements resulted from a statutory duty to bargain collectively and even though the black union apparently fulfilled its duty of fair representation in entering the contract, the court held that the employer violated Title VII since, in enforcing the agreement, the employer preserved the effects of past discrimination. Id. at 496-97, 5 FEP Cases at 857-58.

[38] Rosen v. Public Serv. Elec. & Gas Co., 477 F.2d 90, 5 FEP Cases 709 (3d Cir. 1973).

[39] 486 F.2d 870, 6 FEP Cases 813.

[40] 479 F.2d 354, 5 FEP Cases 823 (8th Cir. 1973).

[41] 486 F.2d at 875-76, 6 FEP Cases at 816.

[42] Id.

[43] Id. at 878, 6 FEP Cases at 818.

[44] Id. at 875-76, 6 FEP Cases at 816.

> than punitive), and the clear intent of Congress that the grant of authority under Title VII should be broadly read and applied mandate an award of back pay unless exceptional circumstances are present.[45]

Finding neither a valid defense to an award of back pay on the basis of business necessity, nor any reasonable cause for denial of such an award, the Sixth Circuit reversed the trial court's denial of back pay and remanded.[46] The circuit court acknowledged that Congress apparently intended that the award of back pay under Title VII should rest within the sound discretion of the trial court, but stated that such decisions are not free from appellate scrutiny.[47] Reliance was placed on prior case law which established that trial courts must exercise such discretion with a view toward effectuating the purposes of the enabling legislation.[48]

Head thus implies that a failure to award back pay to those suffering economic loss as a result of discrimination prohibited by Title VII amounts to an abuse of discretion by the trial court in the absence of justifying business necessity or other undefined exceptional circumstances. In so implying, the Sixth Circuit seems to be willing to go significantly further than the other circuits in compensating victims of Title VII violations.

Prior to the Sixth Circuit's decision in *Head,* the Third Circuit in *Rosen v. Public Service Electric Co.*[49] adopted the *Bowe* and *Lorillard* rationale and granted affirmative relief in the form of back retirement compensation and increased future retirement benefits. In *Rosen,* the trial court held that both the original and the revised versions of the company's pension plans discriminated on the basis of sex in violation of section 703(a) but the court did not award compensatory damages.[50] The original plan discriminated against men insofar as they received a lower pension than women upon retirement at age sixty, and against women because their mandatory retirement age was lower than that of male employees.[51] The revised plan, instituted in 1967, made retirement mandatory at age 70 for all employees, and it provided for early retirement at 60 with reduced pensions, but it continued to favor women through early

[45] Id. at 876, 6 FEP Cases at 817.

[46] Id. at 880, 5 FEP Cases at 819. In response to Timken's claim of good faith, the court stated that good faith is not a valid defense to an award of back pay. Id. at 877, 5 FEP Cases at 817.

[47] Id.

[48] Id.

[49] 477 F.2d 90, 95-96, 5 FEP Cases 709, 712 (3d Cir. 1973).

[50] Id. at 92, 5 FEP Cases at 710.

[51] Id. at 93-94, 5 FEP Cases at 710.

retirement pension for service prior to the effective date of the plan.[52]

On appeal, the Third Circuit held that the pension plans discriminated on the basis of sex with respect to "terms, conditions or privileges of employment" within the meaning of section 703(a)(1).[53] Equality could properly be achieved by raising the level of men's pensions.[54] Citing *Bowe,* the *Rosen* court reasoned both that the grant of authority to award appropriate affirmative relief in section 706(g) should be read broadly and applied so as to effectively terminate the practice and make the victims whole,[55] and that a duty exists to render such affirmative relief as is needed to remedy the effects of past discrimination by restoring plaintiffs to their proper economic status. The plaintiffs in *Rosen* contended that compensatory damages should have been awarded by the trial court. Accepting this contention, the Third Circuit held that retirement benefits of males must be increased accordingly.[56]

The *Head, Peters* and *Rosen* decisions, following *Bowe* and *Lorillard,* represent a clear majority view among the circuits which have expressly considered the issue of the appropriateness of back pay awards under Title VII, with the Eighth Circuit alone reaching the opposite result. The dominant and, it is submitted, more reasonable view, is that back pay awards are generally required under Title VII to fulfill the purposes of that Act: elimination of present employment discrimination, restoration of aggrieved persons to their rightful economic status, and deterrence of future unlawful employment practices. It seems probable that the Supreme Court, if confronted with this conflict, will reject the Eighth Circuit's refusal to grant back pay, and will adopt the current majority view. However, the Eighth Circuit may obviate the conflict by granting back pay in a future case, pursuant to the implications of *N.L. Industries*.

2. *Hiring Ratios in Public Employment Cases:* Morrow; Harper

Issues concerning minority hiring and promotion preference orders in public employment cases have recently given rise to con-

[52] Id.

[53] Id. at 95, 5 FEP Cases at 711. The defendant contended that the revised plan was valid because it resulted from collective bargaining, but the court correctly rejected this argument on the grounds that Title VII rights cannot be bargained away. Id., 5 FEP Cases at 712. Decisions in other circuits conform to this result. See note 37 supra; Robinson v. Lorillard, 444 F.2d at 799, 3 FEP Cases at 658.

[54] 477 F.2d at 95, 5 FEP Cases at 712.

[55] Id. at 95-96, 5 FEP Cases at 712.

[56] Id.

siderable litigation.[57] Minority preference orders are designed to remedy the effects of past discriminatory hiring or promotion practices and generally require accelerated favorable employment action with respect to minority group members on the basis of a mathematical ratio. To date, most of these cases have arisen prior to the enactment of the Equal Employment Opportunities Act of 1972. The majority of employers upon whom courts have imposed minority hiring and promotion preference orders have been local government agencies, which were not "employers" subject to Title VII prohibitions prior to the 1972 Act. As a result, the preference order cases generally arose under the Constitution and section 1981.[58] However, the courts have drawn analogies from cases decided under Title VII. Thus, it would seem that these cases can be used as a basis for predicting or even determining the outcome of cases arising under Title VII after the 1972 Amendments.

Minority preference orders raise constitutional issues of "reverse discrimination" against members of the previously privileged majority groups.[59] These issues were first resolved by the Eighth Circuit in *Carter v. Gallagher.*[60]

In *Carter,* the fire department in the city of Minneapolis had 535 employees in 1970, but none of them were black, Indian, or Chicano.[61] Claiming that the civil service commission discriminated against minority group applicants in its hiring procedures for the fire department, the plaintiffs brought a class action against the responsible individuals, in their personal and official capacities, seeking declaratory and injunctive relief.[62] The trial court found that the discriminatory practices of the Minneapolis Civil Service Commis-

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[57] See cases cited in note 83 infra.

[58] 42 U.S.C. § 1981 (1970). There would appear to be no question of the propriety of an assertion of jurisdiction by a court under § 1981 in these public employment cases since relief was not available under Title VII. However, in the future, courts will be faced with the necessity of reconciling Title VII actions and § 1981 suits in public as well as private employment discrimination cases. See, Comment, 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1350 (1972).

[59] See Harper v. Mayor & City Council, 359 F. Supp. 1187, 5 FEP Cases 1050 (D. Md. 1972), aff'd and modified in part sub. nom., Harper v. Kloster, 486 F.2d 1134, 6 FEP Cases 880 (4th Cir. 1973), refusing to grant a request for a minority hiring quota or preference order, suggesting but not holding that, as racial classifications, such orders would be constitutionally impermissible, distinguishing the school segregation issue, and finding no "sufficiently compelling need" to impose such "quotas" in the case before it. 359 F. Supp. at 1214, 5 FEP Cases at 1069-70.

[60] 452 F.2d 315, 3 FEP Cases 900 (8th Cir.), aff'd and modified on rehearing, 452 F.2d 327, 4 FEP Cases 121 (8th Cir. 1972), cert. denied, 406 U.S. 950 (1972). For a thorough discussion of *Carter,* see Comment, 14 B.C. Ind. & Com. L. Rev. 293 (1972).

[61] 3 FEP Cases 692, 695 (D. Minn. 1971).

[62] Id.

sion violated section 1981[63] and the equal protection clause of the Fourteenth Amendment, and that relief could be given under section 1983.[64] On the basis of these conclusions, the district court directed the commission to give "absolute preference" to twenty minority group applicants for employment with the fire department, that is, to hire only members of minority groups to fill the next twenty positions open in the fire department.[65] Reasoning that statistical evidence can suffice to establish a prima facie case of discrimination and that the defendants had introduced no substantial evidence to rebut the inference of racial discrimination based on the statistics,[66] the Eighth Circuit panel affirmed the trial court's finding of racially discriminatory hiring testing procedures.[67] *Griggs* established that good intent does not constitute a defense to an action for discrimination brought under Title VII.[68] Similarly, the panel of the Eighth Circuit in *Carter* reasoned that neither section 1981 nor 1983 required wilful discrimination or bad faith as a prerequisite to relief.[69] However, the circuit court panel vacated the absolute preference order, holding that it violated the rights of white applicants under section 1981 and the equal protection clause of the Fourteenth Amendment.[70]

Carter established that absolute minority hiring preference orders violate section 1981 and the Constitution, and no circuit since *Carter* has approved such an order in a class action for discrimination in public employment. The Eighth Circuit panel concluded that section 1981 and the Fourteenth Amendment prohibit employment discrimination against *any* race and that the absolute preference order would result in the denial of employment to qualified whites solely on the basis of race.[71] It would appear that absolute preference orders would also violate Title VII. Section 703(j) prohibits an interpretation that Title VII requires an employer to grant preferential treatment to any individual or group to correct imbalances in the representation of any race, color, religion, sex, or national origin among employees.[72] The Eighth Circuit in *Carter* stated that *Griggs*

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[63] 42 U.S.C. § 1981 (1970).

[64] 42 U.S.C. § 1983 (1970).

[65] 3 FEP Cases at 709.

[66] 452 F.2d at 323, 3 FEP Cases at 905.

[67] Id.

[68] 401 U.S. at 432, 3 FEP Cases at 178.

[69] 452 F.2d at 323, 3 FEP Cases at 906.

[70] Id. at 325, 327, 3 FEP Cases at 907, 909.

[71] Id. at 325, 3 FEP Cases at 907. The court did not, however, discuss the question of whether this racial classification, though suspect under current equal protection analysis, could be justified by a compelling state interest.

[72] 42 U.S.C. § 2000e-2(j) (1970).

supported the decision not to uphold the absolute preference order, though *Griggs* was not decided under section 1981 and the Fourteenth Amendment.[73] In *Griggs,* the Supreme Court reasoned that Congress, in enacting Title VII, proscribed only discriminatory preference for any group, majority or minority, and did not command that persons be hired simply because of their status as minority group members.[74]

Although absolute hiring preference orders appear to be prohibited by the Constitution and section 1981, as well as by Title VII, on rehearing en banc in *Carter,*[75] the Eighth Circuit directed the trial court to enter a limited hiring preference order, or hiring ratio, stating that such orders are within authority possessed by trial courts, and thereby implying that minority preference orders are permissible under section 1981 and the Fourteenth Amendment.[76] On rehearing en banc, the circuit court recognized the need for a remedy which would erase the effects of past discrimination without infringing upon constitutional rights of majority applicants.[77] The Eighth Circuit directed the trial court to order implementation of a hiring ratio of one minority applicant out of every three persons hired until twenty minority group persons had been accepted by the fire department.[78] "Such a procedure does not constitute a 'quota' system because as soon as the trial court's order is fully implemented, all hirings will be on a racially nondiscriminatory basis . . . ."[79] The hiring ratio order would remedy the effects of past discrimination, without depriving qualified whites of employment opportunity. The court noted that analogous relief would be available under section 706(g)[80] of Title VII, which authorizes "such affirmative relief as may be appropriate, which may include . . . hiring of employees . . . ." Moreover, the Eighth Circuit stated that the anti-preference section of Title VII, section 703(j),[81] does not limit the power of a court to order affirmative relief to correct the effects of past discrimination.[82] Following *Carter,* several circuits have ordered or affirmed such remedies in public employment cases under the Fourteenth Amendment and sections 1981 and 1983,[83]

[73] 452 F.2d at 325, 3 FEP Cases at 907.
[74] 401 U.S. at 430-31.
[75] 452 F.2d 327, 4 FEP Cases 121 (8th Cir. 1972).
[76] Id. at 330-31, 4 FEP Cases at 124.
[77] Id.
[78] Id.
[79] Id. at 330, 4 FEP Cases at 124.
[80] 42 U.S.C. § 2000e-5(g) (1970).
[81] 42 U.S.C. § 2000e-2(j) (1970).
[82] 452 F.2d at 329, 4 FEP Cases at 123.
[83] See Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 6 FEP Cases 1045 (2d Cir.

while the Fourth Circuit, in a panel decision[84] during the Survey year, has affirmed a denial of a "hiring quota" and expressed agreement with the trial court's disapproval of "hiring quotas."[85]

The cases involving minority preference orders have arisen on very similar factual situations.[86] Generally, the plaintiffs have been minority group members whose applications for employment with fire departments or with state or local police forces were rejected because of inadequate performance on various forms of hiring examinations. The plaintiffs have introduced statistics which reveal that the examinations have discriminatory impact, and the plaintiffs contend that the tests are not substantially job related. The statistics also demonstrate: the wide discrepancy between the passing performance rate of whites, and that of minority group members on the examinations; and the discrepancy between the percentage of minority group persons employed as policemen or firemen, and the percentage of the population in the relevant geographical area comprised of such minority group members.

Since the cases reported to date are not governed by Title VII, that Act and the EEOC Guidelines issued thereunder which pertain to employment examinations[87] are not controlling. However, in requiring justification of discriminatory examinations, various federal courts have applied the job-relatedness standard developed by the EEOC[88] pursuant to section 703(h) of the Civil Rights Act of 1964[89] and adopted by the Supreme Court in *Griggs*.[90] Section 703(h) permits an employer to base employment decisions upon the results of a "professionally developed ability test" so long as the test is neither designed nor used to discriminate.[91] The Supreme Court in *Griggs* adopted the EEOC interpretation of "professionally developed ability test" as permitting only the use of job-related tests:

1973); Commonwealth v. O'Neill, 473 F.2d 1029, 5 FEP Cases 713 (3d Cir. 1973) (equally divided).

[84] Harper v. Kloster, 486 F.2d 1134, 6 FEP Cases 880 (4th Cir. 1973).

[85] Id. at 1136, 6 FEP Cases at 882.

[86] See Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 6 FEP Cases 1045 (2d Cir. 1973); Bridgeport Guardians v. Comm'n, 482 F.2d 1333, 5 FEP Cases 1344 (2d Cir. 1973); Morrow v. Crisler 479 F.2d 960, 5 FEP Cases 934 (5th Cir. 1973), aff'd and remanded on rehearing, 491 F.2d 1053, 7 FEP Cases 586 (1974); Commonwealth v. O'Neill, 473 F.2d 1029, 5 FEP Cases 713 (3d Cir. 1973); Castro v. Beecher, 459 F.2d 725, 4 FEP Cases 700 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 323, 4 FEP Cases 121 (8th Cir. 1972).

[87] 29 C.F.R. § 1607 (1973).

[88] Id.

[89] 42 U.S.C. § 2000e-2(h) (1970).

[90] 401 U.S. at 433-34. This standard was applied in Bridgeport Guardians v. Civil Serv. Comm'n, 482 F.2d at 1337, 5 FEP Cases at 1347; Castro v. Beecher, 459 F.2d at 732, 4 FEP Cases at 706; Commonwealth v. O'Neill, 348 F. Supp. 1084, 1102-03, 4 FEP Cases 970, 984 (E.D. Pa. 1972).

[91] 42 U.S.C. § 2000e-2(h) (1970).

those which fairly measure "the knowledge or skills required by the particular job or class of jobs."[92] The *Griggs* standard, adopted from the EEOC guidelines, bears a significant relationship to minority preference order issues. The cases which have resulted in the entrance of such orders, have often involved charges of discriminatory employment tests and employment qualifications. Further, the courts have scrutinized discriminatory hiring examinations under the *Griggs* standard, which is that the tests must be substantially job-related, rather than under the compelling state interest test.[93]

The First Circuit, in *Castro v. Beecher,*[94] was the first circuit court to adopt the *Griggs* standard in a case not controlled by Title VII. In holding that a hiring ratio or limited preference order would be appropriate to remedy the effects of past discrimination in the hiring of Boston policemen,[95] the court affirmed the finding of the trial court that the hiring test had a racially discriminatory impact and was not substantially job-related.[96] *Castro* is significant because the court, in holding that use of the hiring examination violated the Equal Protection Clause of the Fourteenth Amendment, applied neither the rational basis test nor the compelling state interest standard.[97] Instead, the First Circuit adopted the arguably less demanding job-relatedness standard of *Griggs*.

Upon a determination that an examination has a discriminatory impact and is not substantially related to job performance, the trend of federal court decisions, in public employment cases since *Carter* was decided in 1972, has been toward willingness to order minority hiring preferences to remedy the effects of past discrimination. Developments during the Survey year have highlighted this trend and it now appears that approval of minority hiring preference orders represents the majority view among the federal courts, although the Fourth Circuit appears to have adopted the opposite position.

During the Survey year, the Second and Third Circuits affirmed limited preference orders, or hiring ratios, entered by the respective trial courts in public employment cases under section 1981 and the Fourteenth Amendment.[98] In contrast, the Fourth Circuit in *Harper v. Kloster*[99] held that the trial court properly refused to order a minority hiring preference or to retain jurisdiction

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[92] 401 U.S. at 433-34, 3 FEP Cases at 178-79.

[93] See cases cited in note 90 supra.

[94] 459 F.2d 725, 4 FEP Cases 700 (1st Cir. 1972).

[95] Id. at 736-37, 4 FEP Cases at 709.

[96] Id. at 735, 4 FEP Cases at 708.

[97] Id. at 733, 4 FEP Cases at 706.

[98] Vulcan Soc'y v. Civil Serv. Comm'n, 490 F.2d 387, 6 FEP Cases 1045 (2d Cir. 1973); Commonwealth v. O'Neill, 473 F.2d 1029, 5 FEP Cases 713 (3d Cir. 1973).

[99] 486 F.2d 1134, 1136-37, 6 FEP Cases 880, 882 (4th Cir. 1973).

in order to remedy the effects of discrimination. The Fifth Circuit, in *Morrow v. Crisler,*[100] held initially in a panel decision, that the district court did not abuse its discretion in failing to enter a limited hiring preference order to remedy the effects of discrimination, but the circuit court retained jurisdiction.[101] Upon rehearing by the Fifth Circuit en banc in *Morrow,* the case was remanded to the trial court with directions to order some form of affirmative hiring relief.[102]

In *Morrow,* the Fifth Circuit affirmed the finding of the trial court that the Mississippi State Highway Patrol had engaged in a pattern and practice of racial discrimination in its hiring procedures which violated the Fourteenth Amendment.[103] Statistics in the trial record showed that the state's population was over thirty-six percent black, but that there had never been a black state highway patrol officer in Mississippi.[104] In a panel decision, the Fifth Circuit affirmed the decree of the district court which "delcared the right of the plaintiffs and the members of the plaintiff class to be treated equally without racial discrimination."[105] The defendants were required to conduct an affirmative recruiting program directed toward attracting black applicants and to comply with regulations prohibiting the use of any racial terms and epithets.[106] The Fifth Circuit panel affirmed the injunction prohibiting racial discrimination in the processing of applications and prohibiting the use of intelligence tests which had not been validated or proven to be significantly related to job performance.[107]

The pivotal issue determined in the panel opinion was whether the trial court abused its discretion by failing to grant equitable relief which would be sufficient to bar future discrimination as well as to remove the discriminatory effects of past unlawful employment practices.[108] Without reaching the question of whether the Constitution permits "quota based relief, a point that deserves serious consideration,"[109] the Fifth Circuit panel reasoned that there was no showing that the relief which *was* granted would not remedy the wrong. Therefore, the court held that denial of relief in the form of

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[100] 479 F.2d 960, 5 FEP Cases 934 (5th Cir. 1973), aff'd and remanded on rehearing, 491 F.2d 1053, 7 FEP Cases 586 (1974).

[101] 479 F.2d at 964, 5 FEP Cases at 937.

[102] 491 F.2d at 1055, 7 FEP Cases at 587.

[103] 479 F.2d at 962, 5 FEP Cases at 935.

[104] Id.

[105] Id.

[106] Id.

[107] Id.

[108] 479 F.2d at 963, 5 FEP Cases at 936.

[109] Id. at 964, 5 FEP Cases at 937. In *Carter,* the Eighth Circuit clearly stated that the hiring ratio order did not amount to a quota system. 452 F.2d at 330-31, 4 FEP Cases at 124.

a limited hiring preference order did not constitute an abuse of discretion; nonetheless, the court retained jurisdiction "to make the decree work."[110]

Significantly, the panel decision in *Morrow* suggests a method of accommodating: the broad discretion traditionally afforded trial courts in fashioning equitable decrees and the need to order sufficient affirmative class-wide relief to eradicate the effects of past discriminatory hiring practices. However, if the panel decision is followed in similar cases where the trial court has declined to order a minority hiring preference ratio, *Morrow* could result in delaying and hindering the vindication of constitutional and Title VII rights.

Judge Goldberg entered a dissent to the panel opinion.[111] He noted that the district court had offered no explanation for withholding the requested limited hiring preference order and concluded that the relief afforded, amounting to little more than an order to " 'stop discriminating,' " was inadequate to remedy the constitutional deprivations.[112] He cited *Carter* and *Castro* as support for the proposition that affirmative relief in the form of hiring ratios is both appropriate and necessary[113] where an historical pattern of discrimination is shown in public employment cases. In *Carter,* the Eighth Circuit vacated the absolute preference order and directed the imposition of a hiring preference ratio.[114] The First Circuit in *Castro* did state that "some form of compensatory relief is mandated" and implied that a limited hiring preference order is necessary in such cases.[115] However, the First Circuit in *Castro* also predicated its decision upon the district court's error in denying the plaintiffs' request to maintain a class action, since that denial rendered a hiring ratio inappropriate[116] and, consequently, the court did not hold that the failure to impose a hiring ratio constituted an abuse of discretion.

On rehearing en banc in *Morrow,* the Fifth Circuit decided that:

> . . . the case should have been and must now be remanded for the District Court, in the first instance, to fashion an appropriate decree which will have the certain result of increasing the number of blacks on the Highway Patrol.[117]

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[110] 452 F.2d at 330-31, 4 FEP Cases at 124.
[111] 479 F.2d at 968, 5 FEP Cases at 937.
[112] Id. at 970, 5 FEP Cases at 938.
[113] Id. at 971-72, 5 FEP Cases at 939-40.
[114] See text at notes 60-85 supra.
[115] 459 F.2d at 736-37, 4 FEP Cases at 709.
[116] Id. at 735-36, 4 FEP Cases at 705.
[117] 491 F.2d at 1055, 7 FEP Cases at 587.

While ninety-one patrolmen were added to the force of five hundred after the district court decision, only six of those hired were blacks.[118] This experience convinced the circuit court on rehearing that the trial court was "wrong" and that the relief ordered was "insufficient."[119] Consequently, the case was remanded to the district court with guidelines to aid in shaping a decree.[120]

> Beyond insuring that objective hiring criteria are utilized, it will be incumbent on the District Court to order some affirmative hiring relief. It may, within the bounds of discretion, order *temporary* one-to-one or one-to-two hiring, the creation of hiring pools, or a freeze on white hiring, or any other form of affirmative hiring relief until the Patrol is effectively integrated. We emphasize, however, that the imposition of some affirmative hiring relief need not inexorably lead to the dilution of valid employment requirements.[121]

The en banc decision in *Morrow* would appear to indicate that, in similar factual situations in the future, the Fifth Circuit will require the trial court to grant affirmative relief in the form of minority hiring preference orders.

The Survey year panel decision of the Fourth Circuit in *Harper v. Kloster*[122] presents a sharp contrast to the decisions of the First, Second, Third, Fifth and Eighth Circuits[123] approving limited hiring preference orders. The trial court in *Harper* concluded that the hiring examinations utilized in hiring firemen had a discriminatory impact[124] and were not substantially related to job performance.[125] Moreover, the court concluded that the plaintiff class had been subject to a pattern of historical discrimination.[126] Nonetheless, the plaintiffs' request for a minority hiring preference order was rejected.[127] Reasoning that the constitutional status of "hiring quotas" is an unsettled question, the trial court suggested that "racial employment quotas may not be valid ingredients in relief,"[128] denied

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[118] Id.
[119] Id.
[120] Id.
[121] Id. at 1056, 7 FEP Cases at 588.
[122] 486 F.2d 1134, 6 FEP Cases 880 (4th Cir. 1973).
[123] See cases cited in note 86 supra.
[124] 359 F. Supp. at 1199, 5 FEP Cases at 1057.
[125] Id. at 1203, 5 FEP Cases at 1060.
[126] Id. at 1195, 5 FEP Cases at 1054.
[127] Id. at 1213, 5 FEP Cases at 1069.
[128] Id. at 1214, 5 FEP Cases at 1069. The court referred to minority hiring preference orders as "hiring quotas." Id. at 1215, 5 FEP Cases at 1070.

the requested remedy, and ordered instead that hiring be confined to residents of the City of Baltimore.[129]

The trial court's refusal to order a "hiring quota" in *Harper* was based upon the premise that minority hiring preference orders create suspect classifications and must be subject to rigid scrutiny.[130] Moreover, the use of racial quotas in education cases was distinguished.

> Racial quotas in education impose no burden on anyone, since no one has a right to attend a segregated school. On the contrary, all prospective employees have the right to consideration for public employment without regard to race.[131]

Purporting not to choose between applying the standard of business necessity or that of a compelling state interest to justify the imposition of a hiring preference order,[132] the court found no need to enter such an order.

> The Court simply concludes that the law's rigid scrutiny of racial classifications must be an element of the Court's exercise of its remedial powers. And in this case, no sufficiently compelling need exists for the imposition of racial quotas.[133]

In effect, the trial court in *Harper did* apply the compelling state interest test in determining whether to grant a minority hiring preference order. On appeal, a panel of the Fourth Circuit modified the district court's decision as to parties and expressly affirmed the denial of the requested "hiring quota" as well as the determination of the trial court not to retain jurisdiction.[134]

The en banc decision of the Fifth Circuit in *Morrow* suggests that failure to grant minority hiring preference orders in cases of historical discrimination against a minority group may be an abuse of discretion. *Harper,* in contrast, suggests that minority hiring preference orders may not be constitutionally permissible. *Harper* casts a shadow of uncertainty over the constitutional status of minority hiring preference orders, raising the possibility that they may be impermissible racial classifications.[135] As the trial court

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[129] Id. at 1215, 5 FEP Cases at 1070.

[130] Id. at 1213-14, 5 FEP Cases at 1069-70.

[131] Id. at 1214, 5 FEP Cases at 1069.

[132] Id., 5 FEP Cases at 1070.

[133] Id.

[134] 486 F.2d at 1136-37, 6 FEP Cases at 882-83.

[135] *Harper* derives some support from the dissenting opinion of Justice Douglas in DeFunis v. Odegaard, — U.S. —, 94 S. Ct. 1704, 1708 (1974). Because the University of

stated in *Harper,* this is by no means a settled question.[136] It awaits final resolution by the Supreme Court. Meanwhile, however, *Harper* is likely to remain a minority view, and the majority of federal courts will continue to approve limited minority hiring preferences orders in public employment cases to remedy the effects of discriminatory hiring practices. It should also be noted that the question of whether a compelling state interest exists in eliminating racial barriers to public employment, as well as the effects of past discrimination, underlies the controversy over the constitutionality of minority hiring preference orders. Thus, racial classifications in the form of hiring preference orders might be justified under even the most rigid scrutiny.

There is considerable support for the view that limited minority hiring preference orders are permissible to remedy the effects of an historical pattern of discrimination in a public employment case. The First Circuit in *Castro* reversed a denial of such relief and recognized the necessity of ordering some form of hiring preference.[137] In a recent school desegregation case, *Swann v. Charlotte-Mecklenburg Board of Education,*[138] the Supreme Court upheld the use of mathematical ratios "as a starting point" in fash-

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Washington Law School utilized different criteria in judging minority group applicants and white applicants, Justice Douglas reasoned that this racial classification was subject "to the strictest scrutiny under the Equal Protection Clause." 94 S. Ct. at 1714. However, he concluded that, in light of the cultural bias inherent in the standardized admission test, the law school was justified in applying different standards to minority group applicants. Id. at 1715. Nonetheless, Justice Douglas used the opportunity presented by *DeFunis* to express general disapproval of racial preferences on constitutional grounds.

Justice Douglas emphasized that each application should be considered *"in a racially neutral way."* Id. at 1717. Moreover, he rejected the argument that a compelling state interest justified "the racial discrimination that is practiced here." Id. at 1718.

> The Equal Protection Clause commands the elimination of racial barriers not their creation in order to satisfy our theory as to how society ought to be organized. . . . All races can compete fairly at all professional levels. So far as race is concerned, any state sponsored preference to one race over another in that competition is in my view "invidious" and violative of the Equal Protection Clause.

Id. at 1718-19. Thus, it might be inferred from this dissenting opinion that all that is required, indeed all that is permitted, in employment discrimination cases is the elimination of discriminatory requirements. Like the Fourth Circuit in *Harper,* Justice Douglas distinguished the school desegregation issue. He reasoned that the policy of prescribing racial ratios proportional to representation in the population suggested in Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971), would not exclude anyone from a public school and would not impinge upon constitutional rights since "no one has a right to attend a segregated school." 94 S. Ct. at 1715 n.18. However, Justice Douglas also noted that *DeFunis,* unlike *Griggs,* did not involve racial barriers and that there was no showing that the policy of the law school was designed to eliminate "arbitrary and unnecessary barriers to entry by certain racial groups. . . ." Id. This suggests that the use of minority hiring preference orders to eliminate such barriers and to remedy the effects of past discrimination would be permissible.

[136] 486 F.2d at 1213, 5 FEP Cases at 1069.

[137] 459 F.2d at 737, 4 FEP Cases at 709.

[138] 402 U.S. 1 (1971).

ioning a remedy for a condition which offends the Constitution.[139] Moreover, the Supreme Court reasoned that school desegregation cases are fundamentally similar to "other cases involving the framing of equitable remedies to repair the denial of a constitutional right."[140] The language of the Supreme Court's opinion in *Louisiana v. United States,*[141] lends strong support to the proposition that minority hiring preference orders are constitutionally permissible and arguably suggests that a denial of a limited hiring preference order may constitute an abuse of discretion by the trial court in certain circumstances. In *Louisiana,* which involved the denial of black citizens' right to vote, the Supreme Court stated that "the court has not merely the power but the duty to render a decree which will *so far as possible* eliminate the discriminatory effects of the past as well as bar like discrimination in the future."[142] *Swann's* approval, in constitutional cases, of remedial orders which embody mathematical ratios, coupled with the recognition in *Louisiana* that courts have a duty to fashion such affirmative relief as will suffice to remedy the effects of past discrimination, suggests that limited minority hiring preference orders are constitutionally permissible.[143]

In the future, Title VII will apply to public employment discrimination cases because the Equal Employment Opportunity Act of 1972 brought state and local governments under the section 701 definition of "employer." The question of the permissibility of limited minority preference orders in class actions under Title VII to remedy the effects of prior discrimination is also unsettled. A final determination that minority hiring preference orders do not violate the Constitution would not necessarily resolve the issue of the permissibility of such orders under Title VII because the pertinent statutory provisions are ambiguous, if not inconsistent. Section 703(j) of Title VII provides that the Act shall not be "interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual on account of an imbalance which may exist . . ." between the percentage of such persons employed and the percentage in the pertinent population of the base.[144] In *Griggs,* the Supreme Court stated that the Act does not command that individuals be hired simply because they are mem-

[139] Id. at 25.

[140] Id. at 15-16.

[141] 380 U.S. 145 (1965).

[142] Id. at 154 (emphasis added).

[143] The Supreme Court denied certiorari in *Carter.* 406 U.S. 950 (1972). Cf. Watson v. Memphis, 373 U.S 526, 539 (1963).

[144] 42 U.S.C. § 2000e-2(j) (1970).

bers of under-represented minority groups.[145] However, it would appear that limited hiring preference orders would be permissible under Title VII.[146] In *Carter,* the Eighth Circuit, in referring by analogy to Title VII, stated that section 703(j) "does not limit the power of a court to order affirmative relief to correct the effects of past unlawful practices."[147] This statement has support in the statute itself. Section 703(g) provides that the court may "order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees . . . ."[148] Thus it is submitted that section 703 permits but does not require limited minority hiring preference orders, and the majority of federal circuit courts are likely to uphold such orders on appeal under Title VII, as they have under the Fourteenth Amendment and sections 1981 and 1983.[149]

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[145] 401 U.S. at 430-31.

[146] See Comment, 14 B.C. Ind. & Com. L. Rev., 297, 306 (1972). Although several circuits have affirmed federal district court decisions ordering the implementation of hiring ratios, no federal court of appeals has upheld a *promotion* preference order in a public employment case. During the Survey year, the Second Circuit, in Bridgeport Guardians, Inc. v. Comm'n, 482 F.2d 1333, 5 FEP Cases 1344 (2d Cir. 1973), and the Third Circuit, in Commonwealth v. O'Neill, 473 F.2d 1029, 5 FEP Cases 713 (3d Cir. 1973), reversed limited minority promotion preference orders entered by district courts in public employment cases. In both of these cases, the police departments administered written hiring examinations which were shown to have discriminatory impact. Bridgeport Guardians, Inc. v. Comm'n, 482 F.2d at 1336, 5 FEP Cases at 1346; Commonwealth v. O'Neill, 348 F. Supp. 1084, 1090-91, 4 FEP Cases 970, 974-75 (E.D. Pa. 1972). The circuit courts refused to uphold the promotion quotas, but affirmed the hiring preference orders. Bridgeport Guardians, Inc. v. Comm'n, 482 F.2d at 1341, 5 FEP Cases at 1351; Commonwealth v. O'Neill, 473 F.2d at 1031, 5 FEP Cases at 714.

The reliance by the Courts, in determining public employment cases upon private employer discrimination decisions under Title VII, suggests the appropriateness of limited promotion preference orders. In United States v. N.L. Indus., 479 F.2d 354, 5 FEP Cases, 823 (8th Cir. 1973) the court found the foreman selection process discriminatory and consequently ordered the employer to institute a minority promotion ratio. 479 F.2d at 378-80, 5 FEP Cases at 841-43. Promotions were to be made from a list of qualified employees. Id. Where a plaintiff had introduced statistics showing the discriminatory impact of a promotion test as well as the under-representation of minorities in the positions for which the test is utilized, the courts should require the defendant to justify the examination under the job-relatedness standard. If the defendant fails to do so, limited minority promotion preference orders entered by district courts should be upheld. Such orders are designed to remedy the effects of past discrimination and should be treated similarly to hiring ratios, which the courts have consistently upheld on appeal.

[147] 452 F.2d at 329, 4 FEP Cases at 123.

[148] 42 U.S.C. § 2000e-2(j) (1970).

[149] The significance of the present applicability of Title VII to public employment discrimination cases should not be overestimated. Several circuits have allowed plaintiffs to bring suit under § 1981 of the Civil Rights Act of 1866 and intentionally to bypass the delays and obstacles under Title VII where both are available theories of relief. In those circuits, limited minority preference orders would be available as remedies for past discrimination. Caldwell v. National Brewing Co., 443 F.2d 1044, 1046, 3 FEP Cases 600, 602 (5th Cir. 1971), cert. denied, 405 U.S. 916 (1972); Young v. International Tel. & Tel. Co., 438 F.2d 757, 764, 3 FEP Cases 146, 151 (3d Cir. 1971); Waters v. Wisconsin Works of Int'l Harvester Co., 427 F.2d 476, 484, 2 FEP Cases 524, 530 (7th Cir.), cert. denied, 400 U.S. 911 (1970).

Moreover, in *Swann* the Supreme Court upheld a lower court school desegregation order imposing mathematical ratios[150] under a statute[151] similar to section 703(j) in that it limited possible interpretations of the powers granted under the legislation, and expressly withheld authority to order busing to achieve racial balance. Writing the opinion for the unanimous Court in *Swann,* Chief Justice Burger reasoned that the statute foreclosed an interpretation of Title IV of the Civil Rights Act of 1964 as expanding the existing powers of federal courts.[152] However, he concluded that the trial court's busing order was permissible since the section did not restrict or withdraw the "historic equitable remedial powers" of the courts.[153] Section 703(j) of Title VII should be construed similarly: as withholding a grant of additional powers, but not as reducing the existing powers of the federal courts to order affirmative relief to remedy the effects of past discrimination.

VI. FEDERAL COURT INJUNCTIONS: Granny Goose Foods

In a decision during the Survey year, *Granny Goose Foods, Inc. v. Teamsters Local 70,*[1] the Supreme Court resolved an important procedural question regarding the effect of the removal of a case to the federal court[2] after an ex parte, temporary injunction has been issued by the state court. A federal statute provides that the state court injunction "shall remain in full force and effect until dissolved or modified"[3] by the federal district court exercising its federal question removal jurisdiction. In *Granny Goose Foods,* the Court unanimously held that this statute did not indefinitely extend

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See, Comment, 1971-1972 Annual Survey of Labor Relations Law, 13 B.C. Ind. & Com. L. Rev. 1347, 1350 (1972).

[150] 402 U.S. at 32.

[151] 42 U.S.C. § 2000c-6 (1970).

[152] 402 U.S. at 17.

[153] Id.

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[1] — U.S. —, 94 S. Ct. 1113, 85 L.R.R.M. 2481 (1974).

[2] 28 U.S.C. § 1441 (1970) provides for removal of a case from a state court to the federal district court where a question of federal law exists. This statute has been held to include removal of suits for breach of a collective bargaining agreement. Avco Corp. v. Machinists Lodge 735, 390 U.S. 557 (1968).

[3] 28 U.S.C. § 1450 (1970) provides in pertinent part:

> Whenever any action is removed from a State court to a district court of the United States, any attachment or sequestration of the goods or estate of the defendant in such action in the State court shall hold the goods or estate to answer the final judgment or decree in the same manner as they would have been held to answer final judgment or decree had it been rendered by the State court. . . .
>
> All injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.

the duration of the state court injunction beyond that period mandated by the state court.[4]

The issue arose upon an employer's motion in the federal district court to hold a union in contempt for allegedly violating a temporary restraining order issued by a California state court against strike activity. The federal district court granted the motion, although the injunction had been limited by the state court to a fifteen day period, which had expired more than six months before the date of the alleged union contempt of that temporary injunction.[5] The federal district court had held that when the case was removed, shortly after the issuance of the state court restraining order, under the federal removal statute that order was converted into an injunction of indefinite duration because the statute required that state court injunctions "remain in full force and effect until dissolved or modified" by the federal district court.[6] Since no such dissolution or modification had ever been made by it, the federal district court found the union in contempt on the grounds that the state court's temporary restraining order did not expire after the passage of the fifteen-day period, but instead had remained in effect indefinitely,[7] and was thus in effect at the time the alleged contempt by the union occurred.

The Supreme Court disagreed with this interpretation of the "full force and effect" removal statute, and sought to resolve a conflict among the circuits over the effect of that statute.[8] The Court stated that the statute was not intended to turn state court temporary restraining orders confined to a limited time period into federal court injunctions of unlimited duration merely due to the change of jurisdiction.[9] The majority opinion, with which the concurring opinion agreed in this respect,[10] reasoned that the "full force and effect" removal statute was intended merely to protect the rights and remedies delineated by the state court from lapse due to a change of a jurisdiction of the case, and was not intended to give a party a greater remedy after removal than that which was fashioned by the state court.[11] An interpretation of the statute as automatically removing expiration dates from the state court injunction and sub-

[4] 94 S. Ct. at 1124, 85 L.R.R.M. at 2486. A concurring opinion written by Justice Rehnquist, with whom the Chief Justice and Justices Stewart and Powell concurred, agreed with this holding, but differed with the majority on other issues. 94 S. Ct. at 1127, 85 L.R.R.M. at 2489.

[5] Id. at 1119-20, 85 L.R.R.M. at 2482-83.

[6] Id. at 1121, 85 L.R.R.M. at 2483.

[7] Id.

[8] Id. at 1118 n.2 (citing cases), 85 L.R.R.M. at 2481-82 n.2 (citing cases).

[9] Id. at 1122, 85 L.R.R.M. at 2485.

[10] Id. at 1127, 85 L.R.R.M. at 2489.

[11] Id. at 1122-23, 85 L.R.R.M. at 2485.

stituting an injunction of indefinite duration appeared to the Court to give the party that sought the state injunction a greater remedy after the removal than before, a result clearly not intended by Congress.[12]

This interpretation of the removal statute would have been sufficient to permit the majority to conclude that the temporary restraining order expired by its own terms after the fifteen-day period, that is, almost six months before the alleged union contempt of that order. Nevertheless, the majority opinion embarked upon a second line of reasoning, disagreement with which provoked a concurring opinion.[13] The majority stated that under Rule 65(b)[14] of the Federal Rules of Civil Procedure, the life of the state court injunction was in any case limited to a ten-day maximum duration, since upon removal, the proceedings are governed by the procedural rules of the federal court.[15] Thus, the majority indicated that although the federal removal statute provided for continued effect of the state injunction according to its terms until dissolved or modified by the federal district court, nevertheless the life of that state order would be terminated sooner than defined by its terms if the ten-day Rule 65(b) period, as measured from the date of removal, expired sooner.[16]

> An *ex parte* temporary restraining order issued by a state court prior to removal remains in force after removal no longer than it would have under state law, but in no event does the order remain in force longer than the time limitations imposed by Rule 65(b) measured from the date of removal.[17]

Although agreeing that the federal removal statute could not, without action by the federal court, *extend* the state court order beyond the duration for which it was issued, in his concurring opinion, Justice Rehnquist's concurring opinion argued that Rule 65(b) could not be applied to restrict the duration for which the state order was issued.[18] Noting that the entire Court agreed that any conflict between a procedural rule and a statute should be resolved

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[12] Id.

[13] Id. at 1127, 85 L.R.R.M. at 2489.

[14] Fed. R. Civ. P. 65(b) states in pertinent part:
Every temporary restraining order . . . shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order for good cause shown, is extended for a like period. . . .

[15] 94 S. Ct. at 1123, 85 L.R.R.M. at 2485-86.

[16] Id. at 1123, 85 L.R.R.M. at 2486.

[17] Id. at 1124, 85 L.R.R.M. at 2486.

[18] Id. at 1127, 85 L.R.R.M. at 2487.

in favor of the latter, Justice Rehnquist reasoned that the application of Rule 65(b) to restrict the duration of the state order, without federal court modification of the order, emasculated the statute. He argued that the application of Rule 65(b) would allow a mere change of jurisdiction to alter the effect of the state court order, without compliance with the statutory requirement that such orders "remain in full force and effect" until dissolution or modification by the federal district court.[19]

It is submitted that the concurring opinion is correct in arguing that the time limitation of Rule 65(b) should not be utilized to limit the duration of the state court temporary restraining order issued prior to removal. To allow such restriction upon the life of the state order would permit a mere change of jurisdiction to shorten the prescribed life of the state order, contrary to the purpose of the federal "full force and effect" removal statute. This dicta in the majority opinion appears to have sanctioned this result.

However, the unanimous holding of the Court that the federal removal statute does not in itself extend the life of the state order beyond its original duration is logical. But, the majority's application of Rule 65(b) to allow mere removal to abbreviate the life of that order appears to contradict the rationale of that holding by permitting a mere change of jurisdiction, without action by the federal court, to alter the rights of the parties as previously defined by the state court. Thus, *Granny Goose Foods,* as applied to suits between unions and employers, would appear to bestow a procedural advantage upon the party whose conduct has been enjoined by the state court, since the life of the state court order may be attenuated but not extended solely because of the change of jurisdiction.

THOMAS J. FLAHERTY

MICHAEL J. VARTAIN

[19] Id. at 1128, 85 L.R.R.M. at 2489-90.